THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1994 CUMULATIVE SUPPLEMENT

Volume 8

Chapters 41A through 52B

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

D. S. Tussey, K. S. Mawyer, K. J. Kennedy
and F. J. Payne

Annotated through 443 S.E.2d 468. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 8 contains the general laws of a permanent nature enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session affecting Chapters 41A through 52B of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 336, p. 77.
North Carolina Court of Appeals Reports through Volume 114, p. 505.
South Eastern Reporter 2nd Series through Volume 443, p. 468.
Federal Reporter 3rd Series through Volume 21, p. 1127.
Federal Supplement through Volume 848, p. 212.
Federal Rules Decisions through Volume 154, p. 535.
Bankruptcy Reports through Volume 166, p. 498.
Supreme Court Reporter through Volume 114, p. 1877.
North Carolina Law Review through Volume 72, p. 1128.
Wake Forest Law Review through Volume 29, p. 646.
Campbell Law Review through Volume 16, p. 145.
Duke Law Journal through Volume 43, p. 1348.
North Carolina Central Law Journal through Volume 20, p. 229.
Opinions of the Attorney General.

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VOLUME 8

Chapter 41A.
State Fair Housing Act.

§ 41A-4. Unlawful discriminatory housing practices.

CASE NOTES

In order for this Act to apply, the discriminatory housing practice must first: (1) occur in a "real estate transaction", and (2) discriminate "because of" one of the reasons listed in this section. Town of Newton Grove v. Sutton, 111 N.C. App. 376, 432 S.E.2d 441, cert. denied, 335 N.C. 181, 438 S.E.2d 208 (1993).

Defendants failed to meet the threshold question of showing that plaintiff did not allow defendants to place a mobile home on the property "because of" defendant's handicapping condition. Town of Newton Grove v. Sutton, 111 N.C. App. 376, 432 S.E.2d 441, cert. denied, 335 N.C. 181, 438 S.E.2d 208 (1993).

§ 41A-7. Enforcement.

Legal Periodicals. — For note, "North Carolina's New AIDS Discrimination Protection: Who Do They Think They're Fooling?," see 12 Campbell L. Rev. 475 (1990).

Chapter 42.

Editor's Note. — The legislation and annotations affecting Chapter 42 have been included in a recently published replacement chapter.

Chapter 43.

Land Registration.

Article 8.

Assurance Fund.

Sec.
43-51. Satisfaction by third person or by Treasurer.

ARTICLE 1.

Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 3.

Procedure for Registration.

§ 43-12. Effect of decree; approval of judge.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 4.

Registration and Effect.

§ 43-18. Registered owner's estate free from adverse claims; exceptions.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 43-21. No right by adverse possession.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 8.

Assurance Fund.

§ 43-51. Satisfaction by third person or by Treasurer.

If there are defendants other than the State Treasurer, and judgment is rendered in favor of the plaintiff and against the Treasurer and some or all of the other defendants, execution shall first be issued against the other defendants, and if such execution is returned unsatisfied in whole or in part, and the officer returning the same shall certify that it cannot be collected from the property and effects of the other defendants, or if the judgment be against the Treasurer only, the clerk of the court shall certify the amount due on the execution to the State Treasurer, and the same shall be paid. In all such cases the Treasurer may employ counsel who shall receive reasonable compensation for his services from the assurance fund. (1913, c. 90, s. 35; C.S., s. 2424; 1993, c. 257, s. 1.)

Effect of Amendments. — The 1993 amendment, effective July 1, 1993, in the first sentence deleted "State Auditor, who shall issue his warrant therefor upon the" preceding "State Treasurer, and the same shall be paid".

Chapter 44.

Liens.

Article 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.

CASE NOTES

Applied in Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 112 N.C. App. 828, 436 S.E.2d 869 (1993).

§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.

CASE NOTES

The Employee Retirement Income Security Act preempts this section, the North Carolina apportionment statute. Hampton Indus., Inc. v. Sparrow, 981 F.2d 726 (4th Cir. 1992).

Applied in Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 112 N.C. App. 828, 436 S.E.2d 869 (1993).

Article 12.

Liens on Certain Agricultural Products.

§ 44-69.1. Effective period for liens on peanuts, cotton and grains.

CASE NOTES

Applied in United States v. Currituck Grain, Inc., 6 F.3d 200 (4th Cir. 1993).

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

Sec.
44A-1. Definitions.
44A-3. When lien arises and terminates.
44A-4. Enforcement of lien by sale.
44A-6.1. Action to regain possession of a motor vehicle or vessel.

Article 2.

Statutory Liens on Real Property.

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

Sec.
44A-23. Contractor's lien; perfection of subrogation rights of subcontractor.

Part 3. Criminal Sanctions for Furnishing a False Statement in Connection with Improvement to Real Property.

44A-24. (Effective October 1, 1994 — See editor's note) False statement a misdemeanor.

Article 3.

Model Payment and Performance Bond.

44A-32. (Effective October 1, 1994 — See editor's note) Designation of official; violation a misdemeanor.
44A-35. Attorneys' fees.

ARTICLE 1.

Possessory Liens on Personal Property.

§ 44A-1. Definitions.

As used in this Article:

(1) "Legal possessor" means
  a. Any person entrusted with possession of personal property by an owner thereof, or
  b. Any person in possession of personal property and entitled thereto by operation of law.

(2) "Lienor" means any person entitled to a lien under this Article.

(2a) "Motor Vehicle" has the meaning provided in G.S. 20-4.01.

(3) "Owner" means
  a. Any person having legal title to the property, or
  b. A lessee of the person having legal title, or
  c. A debtor entrusted with possession of the property by a secured party, or
  d. A secured party entitled to possession, or
  e. Any person entrusted with possession of the property by his employer or principal who is an owner under any of the above.

(4) "Secured party" means a person holding a security interest.

(5) "Security interest" means any interest in personal property which interest is subject to the provisions of Article 9 of the Uniform Commercial Code, or any other interest intended to create security in real or personal property.

(6) "Vessel" has the meaning provided in G.S. 75A-2. (1967, c. 1029, s. 1; 1991, c. 731, s. 1.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, added subdivisions (2a) and (6).

CASE NOTES

This Chapter did not purport to abrogate long established principles under which equitable liens have been enforced by our courts in a variety of situations. Embree Constr. Group, Inc. v. Rafcor, Inc., 97 N.C. App. 418, 388 S.E.2d 604 (1990), modified on other grounds, 330 N.C. 487, 411 S.E.2d 916 (1992).

Cited in State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

§ 44A-2. Persons entitled to lien on personal property.

CASE NOTES

Court of Appeals would decline to create a judicial exception to this Article and hold that when property is seized by a law enforcement agency who thereafter directs the local storage facility to store and retain said property at their direction, the lawful owner is entitled to immediate possession of said property and the law enforcement agency is thereafter held accountable for all storage liens. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

A law enforcement agency is not accountable for storage liens attaching, pursuant to this section, to property seized by the agency and stored, at the agency's direction, by a local storage facility. To hold otherwise would be to create a judicial exception to this Article. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Cited in Griffin v. Holmes, 843 F. Supp. 81 (E.D.N.C. 1993).

§ 44A-3. When lien arises and terminates.

Liens conferred under this Article arise only when the lienor acquires possession of the property and terminate and become unenforceable when the lienor voluntarily relinquishes the possession of the property upon which a lien might be claimed, or when an owner, his agent, a legal possessor or any other person having a security or other interest in the property tenders prior to sale the amount secured by the lien plus reasonable storage, boarding and other expenses incurred by the lienor. The reacquisition of possession of property voluntarily relinquished shall not reinstate the lien. Liens conferred under this Article do not terminate when the lienor involuntarily relinquishes the possession of the property. (1967, c. 1029, s. 1; 1991, c. 344, s. 3; c. 731, s. 2.)

Effect of Amendments. — Session Laws 1991, c. 344, s. 3, effective October 1, 1991, inserted a subsection (a) designation and added a subsection (b), relating to liens conferred under § 44A-2(d).

Session Laws 1991, c. 731, s. 2, also effective October 1, 1991, deleted the changes made by Session Laws 1991, c. 344, s. 3, and added the last sentence of this section. The section is set out as amended by c. 731, s. 2.

CASE NOTES

Cited in Griffin v. Holmes, 843 F. Supp. 81 (E.D.N.C. 1993).

§ 44A-4. Enforcement of lien by sale.

(a) Enforcement by Sale. — If the charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 30 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section. The lienor may bring an action on the debt in any court of competent jurisdiction at any time following maturity of the obligation. Failure of the lienor to bring such action within a 180-day period following the commencement of storage shall constitute a waiver of any right to collect storage charges which accrue after such period. Provided that when property is placed in storage pursuant to an express contract of storage, the lien shall continue and the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges.

The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. If in any such action the owner or other party requests immediate possession of the property and pays the amount of the lien asserted into the clerk of the court in which such action is pending, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party. The request for immediate possession may be made in the complaint, which shall also set forth the amount of the asserted lien and the portion thereof which is not in dispute, if any. If within three days after service of the summons and complaint, as the number of days is computed in G.S. 1A-1, Rule 6, the lienor does not file a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien. The clerk may at any time disburse to the lienor that portion of the cash bond, which the plaintiff says in his complaint is not in dispute, upon application of the lienor. The magistrate or judge shall direct appropriate disbursement of the disputed or undisbursed portion of the bond in the judgment of the court. In the event an action by the owner pursuant to this section is heard in district or superior court, the substantially prevailing party in such court may be awarded a reasonable attorney's fee in the discretion of the judge.

(b) Notice and Hearings. —

(1) If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall give notice to the Division of Motor Vehicles that a lien is asserted and sale is proposed and shall remit to the Division a fee of ten dollars ($10.00). The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party and other person claiming an interest in the

property who is actually known to the Division or who can be reasonably ascertained. The notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the Division by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the Division that a hearing is desired and the Division shall notify lienor. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the Division that a hearing is desired by the return of such form to the Division. Failure of the recipient to notify the Division within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to the sale of the property against which the lien is asserted, the Division shall notify the lienor, and the lienor may proceed to enforce the lien by public or private sale as provided in this section and the Division shall transfer title to the property pursuant to such sale. If the Division is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

If the Division notifies the lienor that the registered or certified mail notice has been returned as undeliverable, the lienor may institute a special proceeding in the county where the vehicle is being held, for authorization to sell that vehicle. In such a proceeding a lienor may include more than one vehicle, but the proceeds of the sale of each shall be subject only to valid claims against that vehicle, and any excess proceeds of the sale shall escheat to the State and be paid immediately to the treasurer for disposition pursuant to Chapter 116B of the General Statutes. A vehicle owner or possessor claiming an interest in such proceeds shall have a right of action under G.S. 116B-38.

The application to the clerk in such a special proceeding shall contain the notice of sale information set out in subsection (f) hereof. If the application is in proper form the clerk shall enter an order authorizing the sale on a date not less than 14 days therefrom, and the lienor shall cause the application and order to be sent immediately by first-class mail pursuant to G.S. 1A-1, Rule 5, to each person to whom the Division has mailed notice pursuant to this subsection. Following the authorized sale the lienor shall file with the clerk a report in the form of an affidavit, stating that two or more bona fide bids on the vehicle were received, the names, addresses and bids of the bidders, and a statement of the disposition of the sale proceeds. The clerk then shall enter an order directing the Division to transfer title accordingly.

If prior to the sale the owner or legal possessor contests the sale or lien in a writing filed with the clerk, the proceeding shall be handled in accordance with G.S. 1-399.

(2) If the property upon which the lien is claimed is other than a motor vehicle required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall issue notice to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different by registered or certified mail, return receipt requested. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the lienor by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the lienor that a hearing is desired. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the lienor that a hearing is desired by the return of such form to the lienor. Failure of the recipient to notify the lienor within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted and the lienor may proceed to enforce the lien by public or private sale as provided in this section. If the lienor is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(c) Private Sale. — Sale by private sale may be made in any manner that is commercially reasonable. If the property upon which the lien is claimed is a motor vehicle, the sale may not be made until notice is given to the Commissioner of Motor Vehicles pursuant to G.S. 20-114(c). Not less than 30 days prior to the date of the proposed private sale, the lienor shall cause notice to be mailed, as provided in subsection (f) hereof, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained. Notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof. The lienor shall not purchase, directly or indirectly, the property at private sale and such a sale to the lienor shall be voidable.

(d) Request for Public Sale. — If an owner, the person with whom the lienor dealt, any secured party, or other person claiming an interest in the property notifies the lienor prior to the date upon or after which the sale by private sale is proposed to be made, that public sale is requested, sale by private sale shall not be made. After request for public sale is received, notice of public sale must be given as if no notice of sale by private sale had been given.

(e) Public Sale. —

(1) Not less than 20 days prior to sale by public sale the lienor:

a. Shall notify the Commissioner of Motor Vehicles as provided in G.S. 20-114(c) if the property upon which the lien is claimed is a motor vehicle; and

a1. Shall cause notice to be mailed to the person having legal title to the property if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained, provided that notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof; and

b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held;

and shall publish notice of sale once a week for two consecutive weeks in a newspaper of general circulation in the same county, the date of the last publication being not less than five days prior to the sale.

(2) A public sale must be held on a day other than Sunday and between the hours of 10:00 A.M. and 4:00 P.M.:

a. In any county where any part of the contract giving rise to the lien was performed, or

b. In the county where the obligation secured by the lien was contracted for.

(3) A lienor may purchase at public sale.

(f) Notice of Sale. — The notice of sale shall include:

(1) The name and address of the lienor;

(2) The name of the person having legal title to the property if such person can be reasonably ascertained and the name of the person with whom the lienor dealt;

(3) A description of the property;

(4) The amount due for which the lien is claimed;

(5) The place of the sale;

(6) If a private sale the date upon or after which the sale is proposed to be made, or if a public sale the date and hour when the sale is to be held.

(g) Damages for Noncompliance. — If the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00), together with a reasonable attorney's fee as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled. (1967, c. 1029, s. 1; 1975, c. 438, s. 1; c. 716, s. 5; 1977, c. 74, s. 4; c. 793, s. 1; 1981, c. 690, s. 26; 1983, c. 44, ss. 1, 2; 1985, c. 655, ss. 4, 5; 1989, c. 770, s. 10; 1991, c. 344, s. 1; c. 731, s. 3.)

Effect of Amendments. — Session Laws 1991, c. 344, s. 1, effective October 1, 1991, added "by sale" in the catchline.

Session Laws 1991, c. 731, s. 3, effective July 16, 1991, and applicable to any lien on a motor vehicle pursuant to Article 1 of this Chapter that arises on or after July 16, 1991, in subdivision (b)(1), in the first sentence of the first paragraph substituted "ten dollars ($10.00)" for "four dollars ($4.00)"; in the second sentence of the first paragraph, deleted "and" following "ascertainable," and inserted "and to each secured party and other person claiming an interest in the property who is actually known to the Division or who can be reasonably ascertained" in the third sentence of the first paragraph, substituted "The notice" for "Such notice"; and in the second sentence of the third paragraph, inserted "to whom", and substituted "pursuant to this subsection" for "to previously."

CASE NOTES

Lienor Must Comply with Section when Mail Notice Undeliverable. — Subdivision (b)(1) of this section did not allow a lienor of an abandoned motor vehicle to dispose of it without complying with the requirements of this section as they pertain to other types of personal property when the registered or certified mail notice had been returned as undeliverable. Ernie's Tire Sales & Serv. v. Riggs, 106 N.C. App. 460, 417 S.E.2d 75 (1992).

Applicability of Bond Provision. — The bond provision is located only in the second paragraph of subsection (a), the paragraph governing lien actions filed by the owner of property subject to a lien; accordingly, the bond provision applies only to lien actions filed by the owner of property subject to a lien, not to lien actions filed by the lienor. Griffin v. Holmes, 843 F. Supp. 81 (E.D.N.C. 1993).

Applied in AT & T Family Fed. Credit Union v. Beaty Wrecker Serv., Inc., 108 N.C. App. 611, 425 S.E.2d 427 (1993).

§ 44A-6.1. Action to regain possession of a motor vehicle or vessel.

(a) When the lienor involuntarily relinquishes possession of the property and the property upon which the lien is claimed is a motor vehicle or vessel, the lienor may institute an action to regain possession of the motor vehicle or vessel in small claims court any time following the lienor's involuntary loss of possession and following maturity of the obligation to pay charges. The lienor shall serve a copy of the summons and the complaint pursuant to G.S. 1A-1, Rule 4, on each secured party claiming an interest in the vehicle or vessel. For purposes of this section, involuntary relinquishment of possession includes only those situations where the owner or other party takes possession of the motor vehicle or vessel without the lienor's permission or without judicial process. If in the court action the owner or other party retains possession of the motor vehicle or vessel, the owner or other party shall pay the amount of the lien asserted as bond into the clerk of the court in which the action is pending.

If within three days after service of the summons and complaint, as the number of days is computed in G.S. 1A-1, Rule 6, neither the defendant nor a secured party claiming an interest in the vehicle or vessel files a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien. The clerk may at any time disburse to the lienor that portion of the cash bond which is not in dispute, upon application of the lienor. The magistrate shall:

(1) Direct appropriate disbursement of the disputed or undisbursed portion of the bond; and

(2) Direct appropriate possession of the motor vehicle or vessel if, in the judgment of the court, the plaintiff has a valid right to a lien.

(b) Either party to an action pursuant to subsection (a) of this section may appeal to district court for a trial de novo. (1991, c. 344, s. 2; c. 731, s. 4.)

Editor's Note. — Session Laws 1991, c. 344, s. 2 made this section effective October 1, 1991.

Effect of Amendments. — Session Laws 1991, c. 731, s. 4, effective October 1, 1991, in this section as enacted by Session Laws 1991, c. 344, s. 2, substituted "motor vehicle or vessel" for "motor vehicle, motorboat, watercraft of any kind, or boat trailer" in the catchline, and rewrote subsection (a).

ARTICLE 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 1010, s. 2 provides: "The General Statutes Commission shall conduct a study of statutory lien rights of contractors and subcontractors and payment and performance bonds under Articles 2 and 3 of Chapter 44A of the General Statutes and recommend to the General Assembly changes, modifications and revisions to those statutes as deemed appropriate, including, but not limited to, the matters addressed in the Third Edition to Senate Bill 597 (House Committee Substitute, adopted July 4, 1991), of the 1991 Session of the General Assembly and the interpretation of the law as set forth by the North Carolina Supreme Court in *Electric Supply Co. v. Swain Electrical Co., 328 NC 651 (1991)*, and to report its recommendations to the 1993 General Assembly."

Legal Periodicals. — For note, "Mechanics' Liens—Judicial Legislation at Work: Changes in the Mechanics' Lien Law of North Carolina after Electric Supply Co. v. Swain Electrical Co.," see 27 Wake Forest L. Rev. 1033 (1992).

CASE NOTES

Providing rental equipment does not constitute furnishing material, as the common meaning of the word material is simply "the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made." Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

Cited in K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989); Blalock Elec. Co. v. Grassy Creek Dev.

Corp., 99 N.C. App. 440, 393 S.E.2d 354 (1990); McNeary's Arborists, Inc. v. Carley Capital Group, 103 N.C. App. 650, 406 S.E.2d 644 (1991).

§ 44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.

Legal Periodicals. —

For note, "Judicial Activism Constructs Lenders' Nightmare — Embree Construction Group, Inc. v. Rafcor, Inc. and United Carolina Bank," see 15 Campbell L. Rev. 77 (1992).

CASE NOTES

Purpose. —

The purpose of this lien statute is to protect the interest of the contractor, laborer or materialman. Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (1992).

The lien created by this section secures the right of the claimant to amounts earned whether or not the funds are due or the claimant's job is complete. Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (1992).

There must be a contract, etc. —

Absent express or implied contract, the statutory lien is unavailable. Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (1992).

Providing rental equipment does not constitute furnishing material, as the common meaning of the word material is simply "the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made." Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

First Furnishing. — The judgment in defendant's favor properly ordered a sale of the property to enforce defendant's statutory lien, and the lien related back to the date of the first furnishing listed in the claim of lien and judgment even though the court failed to include the beginning date of the work. Metropolitan Life Ins. Co. v. Rowell, 113 N.C. App. 779, 440 S.E.2d 283 (1994).

Compliance With Requisite Elements Created Valid Lien. — Contractor complied with all the required elements under North Carolina law in order to establish a valid lien under this chapter where it was undisputed that contractor performed pursuant to a contract, that it proved the first date it furnished materials at the construction project and its contract was with the owner of the property since contractor's contract was with person who became legal owner of the property by a valid deed. Southeastern Sav. & Loan Ass'n v. Rentenback Constructors, Inc., 114 Bankr. 441 (E.D.N.C. 1989).

Materialman's Lien Superior to Faulty Deed of Trust. — Where deed of trust which was recorded did not convey debtor's predecessor's interest in that property, but instead purported to convey an interest which debtor did not have, and the deed was indexed with debtor as grantor and thus was recorded outside of its chain of title which had the same effect on notice as no registration, fact that such deed was signed general partner of actual owner had no effect, hence materialmen's lien was superior to deed of trust. Southeastern Sav. & Loan Ass'n v. Rentenback Constructors, Inc., 114 Bankr. 441 (E.D.N.C. 1989).

Cited in Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 403 S.E.2d 291 (1991); Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

§ 44A-10. Effective date of liens.

CASE NOTES

First Furnishing. — The judgment in defendant's favor properly ordered a sale of the property to enforce defendant's statutory lien, and the lien related back to the date of the first furnishing listed in the claim of lien and judgment even though the court failed to include the beginning date of the work. Metropolitan Life Ins. Co. v. Rowell, 113 N.C. App. 779, 440 S.E.2d 283 (1994).

Mechanic's Lien for Work Done to Bring Property into Compliance with Restrictive Covenants. — Where it was undisputed that plaintiff first furnished labor or materials at lot for the purpose of bringing the property into compliance with the terms of applicable protective covenants on June 8, 1987, over a year after defendant's deed of trust on the property was recorded, plaintiff did not have priority over defendant and defendant was entitled to judgment as a matter of law. K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

Applied in Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Cited in Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

§ 44A-12. Filing claim of lien.

CASE NOTES

Filing is Required. — Although a second tier subcontractor must notice its claim of lien using a format substantially similar to that provided in § 44A-19, perfection of this lien is not achieved merely upon proper notice; the claim of lien must also be filed pursuant to this section before it is considered perfected. Cameron & Barkley Co. v. American Ins. Co., 112 N.C. App. 36, 434 S.E.2d 632 (1993).

First Furnishing. — The judgment in defendant's favor properly ordered a sale of the property to enforce defendant's statutory lien, and the lien related back to the date of the first furnishing listed in the claim of lien and judgment even though the court failed to include the beginning date of the work. Metropolitan Life Ins. Co. v. Rowell, 113 N.C. App. 779, 440 S.E.2d 283 (1994).

Contents. — A claim of lien need only identify the owner, the claimant, and the party with which the claimant contracted. Thus, while plaintiff's claim of lien met the requirements of this section, the claim of lien did not meet the requirements of § 44A-19, because the claim of lien did not name defendant or assert rights available to plaintiff via a notice of claim of lien. Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

Provision of contract between debtor and contractor in which the contractor warrants that title to all work, materials and equipment is free and clear of all liens, claims, security interest or encumbrances if construed as a complete waiver of statutory lien rights, was invalid and unenforceable under North Carolina law. Southeastern Sav. & Loan Ass'n v. Rentenback Constructors, Inc., 114 Bankr. 441 (E.D.N.C. 1989).

Notice of Claim of Lien. — A claim of lien may not serve as a notice of claim of lien because a notice of claim of lien must identify all the parties in the "contractual chain" between the claimant and the owner. Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

Cited in Blalock Elec. Co. v. Grassy Creek Dev. Corp., 99 N.C. App. 440, 393 S.E.2d 354 (1990); Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

§ 44A-13. Action to enforce lien.

Legal Periodicals. —

For note, "Judicial Activism Constructs Lenders' Nightmare — Embree Construction Group, Inc. v. Rafcor, Inc. and United Carolina Bank," see 15 Campbell L. Rev. 77 (1992).

CASE NOTES

Editor's Note. — *RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983) reversed RDC, Inc. v. Brookleigh Bldrs., Inc., 60 N.C. App. 375, 299 S.E.2d 448 (1983), annotated under this section in the main volume. The annotations to this case which are in the main volume should be disregarded.*

Specific Statute Controls General Section Establishing One Form of Action. — A particular statute controls a general one with reference to the same subject matter. Subsection (a) of this section specifically directs that a lien against property vested in a trustee in bankruptcy "shall be enforced" in accordance with the orders of the bankruptcy court; this provision controls over § 1A-1, Rule 2, which is a general rule establishing one form of action. Therefore, an action under § 1A-1, Rule 2 was not required to enforce lien. RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

Filing of Lien Claim in Bankruptcy Proceedings Commences Action for Enforcement. — The filing by statutory lienor of a proof of claim in bankruptcy proceedings of the owner of the real property constituted the commencement of an action for the enforcement of its lien within the meaning of subsection (a) of this section. RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

Bankruptcy Proceeding Does Not Toll 180-Day Period. — The 180-day period is not a statute of limitations, but an element of the cause of action; it is not tolled by a bankruptcy proceeding. RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

The judgment in defendant's favor properly ordered a sale of the property to enforce defendant's statutory lien, and the lien related back to the date of the first furnishing listed in the claim of lien and judgment even though the court failed to include the beginning date of the work. Metropolitan Life Ins. Co. v. Rowell, 113 N.C. App. 779, 440 S.E.2d 283 (1994).

Applied in Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (1992).

Cited in Blalock Elec. Co. v. Grassy Creek Dev. Corp., 99 N.C. App. 440, 393 S.E.2d 354 (1990); Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

§ 44A-14. Sale of property in satisfaction of judgment enforcing lien or upon order prior to judgment; distribution of proceeds.

CASE NOTES

Cited in Symons Corp. v. Insurance Co. of N. Am., 94 N.C. App. 541, 380 S.E.2d 550 (1989); Blalock Elec. Co. v. Grassy Creek Dev. Corp., 99 N.C. App. 440, 393 S.E.2d 354 (1990).

§ 44A-16. Discharge of record lien.

CASE NOTES

Subdivision (6) is more for the benefit of the landowner, etc. — The primary purpose of subdivision (6) of this section is to protect the landowner, not the lien claimant, who is already protected by virtue of the lien on the property. George v. Hartford Accident & Indem. Co., 330 N.C. 755, 412 S.E.2d 43 (1992).

The primary purpose of subdivision (6) of this section is to provide the landowner a convenient way to unburden his property while the lien claimant's claim is litigated. George v. Hartford Accident & Indem. Co., 330 N.C. 755, 412 S.E.2d 43 (1992).

Lien Not Cancelled by Voluntary Dismissal. — In light of the requirement of subdivision (4) of this section that a judgment must be filed to discharge a lien, a lien may not be cancelled by taking a voluntary dismissal without prejudice. Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

Three Year Limitations Period Applied to Action to Recover on Surety Bond. — Subsection (1) of § 1-52, which provides for a three year statute of limitations, applied to subcontractor's action to recover on contractor's surety bond. George v. Hartford Accident & Indem. Co., 102 N.C. App. 761, 404 S.E.2d 1 (1991), modified on other grounds, 330 N.C. 755, 412 S.E.2d 43 (1992).

Defendant's Liability on Bond Did Not Accrue Until Amount Established. — Where a bond obligated defendant to "pay the full amount of the Lien Claim as established in any appropriate court proceeding," under the clear wording of the bond, the defendant's liability did not accrue until the amount was "established in any appropriate court proceeding." The amount was established in the award of the arbitrator in May, 1988 and became a final judgment August, 1988. Thus plaintiff's claim filed in February 1989 was timely. George v. Hartford Accident & Indem. Co., 102 N.C. App. 761, 404 S.E.2d 1 (1991), modified on other grounds, 330 N.C. 755, 412 S.E.2d 43 (1992).

When Limitations Period Begins to Run in Favor of Corporate Surety. — The statute of limitations begins to run in favor of a corporate surety which has filed a bond discharging a lien under subdivision (6) of this section when final judgment is entered in favor of the lien claimant. George v. Hartford Accident & Indem. Co., 330 N.C. 755, 412 S.E.2d 43 (1992).

A corporate surety bond acts as a substitute for the land; the lien claimant's right to make demand upon the bond accrues at the same time that he would have been able to enforce the lien against the land: at final judgment in his favor. George v. Hartford Accident & Indem. Co., 330 N.C. 755, 412 S.E.2d 43 (1992).

Cited in Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128 (1990).

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

§ 44A-17. Definitions.

CASE NOTES

Quoted in Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

§ 44A-18. Grant of lien; subrogation; perfection.

Legal Periodicals. —

For survey on subcontractors' statutory lien rights, see 70 N.C.L. Rev. 1996 (1992).

CASE NOTES

Editor's Note. — *The cases annotated below were decided prior to the 1992 amendment to § 44A-23, which, inter alia, added subsection (b) of that section.*

The primary purpose of a lien statute is to protect laborers and materialmen who expend their labor and materials upon the buildings of others. Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

Liberal Construction. — The lien statute is remedial in nature and, therefore, should be liberally construed to advance the legislature's intent. No statute, however, should be construed so liberally as to give it a meaning never intended by the legislature. Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

Meaning of "Labor". — Because it is not explicitly defined in this Article, "labor" must be given its common and ordinary meaning. Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

The rental of equipment is not within the scope of "labor or materials" in this Article. Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

Providing rental equipment does not constitute furnishing material, as the common meaning of the word material is simply "the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made." Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

The general lease of a crane was not lienable pursuant to this Article. Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

Under this section, a subcontractor's direct lien rights are limited to the amount owing to the entity above him in the construction chain. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

And if nothing is owing to the first tier subcontractor, the second tier subcontractor has no right to enforce his lien under the plain language of this section. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

But Tiered Subcontractor May Enforce Lien of General Contractor under § 44A-23. — Section 44A-23 expressly preserves the rights of a first, second or third tier subcontractor to enforce the lien of the general contractor. This construction is supported by the inclusion of the language that upon filing of the notice and claim of lien "no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent." This language, not found in this section, indicates that the legislature intended for the subcontractor to be secured by a mechanic's lien to the full extent of his claim. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

While it is true that § 44A-23 expressly limits the tiered subcontractor's lien only "to the extent of his claim," this language does not mean "to the extent of his claim as permitted by this section." Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

Second-tier Subcontractor Had No Lien Rights Upon Funds. — Since nothing was owed to the first-tier subcontractor at or after the time that the second-tier subcontractor filed its lien claim, it was undisputed that the second-tier subcontractor had no lien rights upon funds under this section. Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 403 S.E.2d 291 (1991).

Plaintiff's Subrogation Claim Barred. — Plaintiff had an adequate legal remedy in the form of a statutory lien against defendants pursuant to this section, but did not exercise it in a timely manner. Failure to timely assert the remedy is not a circumstance that renders the statutory remedy "inadequate," because to do so would allow a party to circumvent equitable principles. Therefore, the existence of a legal remedy acts as a legal bar to plaintiff's subrogation claim, and the trial court properly granted summary judgment for defendants. Jones Cooling & Heating, Inc. v. Booth, 99 N.C. App. 757, 394 S.E.2d 292 (1990), cert. denied, 328 N.C. 732, 404 S.E.2d 869 (1991).

Cited in Concrete Supply Co. v. Ramseur Baptist Church, 95 N.C. App. 658, 383 S.E.2d 222 (1989); Cameron & Barkley Co. v. American Ins. Co., 112 N.C. App. 36, 434 S.E.2d 632 (1993).

§ 44A-19. Notice to obligor.

CASE NOTES

Filing Is Also Required. — Although a second tier subcontractor must notice its claim of lien using a format substantially similar to that provided in this section, perfection of this lien is not achieved merely upon proper notice; the claim of lien must also be filed pursuant to § 44A-12 before it is considered perfected. Cameron & Barkley Co. v. American Ins. Co., 112 N.C. App. 36, 434 S.E.2d 632 (1993).

Claim of Lien Insufficient. — A claim of lien may not serve as a notice of claim of lien because a notice of claim of lien must identify all the parties in the "contractual chain" between the claimant and the owner. Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

A claim of lien need only identify the owner, the claimant, and the party with which the claimant contracted. Thus, while plaintiff's claim of lien met the requirements of § 44A-12, the claim of lien did not meet the requirements of this section, because the claim of lien did not name defendant or assert rights available to plaintiff via a notice of claim of lien. Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

§ 44A-21. Pro rata payments.

CASE NOTES

Stated in Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128 (1990).

§ 44A-23. Contractor's lien; perfection of subrogation rights of subcontractor.

(a) First tier subcontractor. — A first tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

(b) Second or third subcontractor. —

(1) A second or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of the Chapter except when:

i. The contractor, within 30 days following the date the building permit is issued for the improvement of the real property involved, posts on the property in a visible location adjacent to the posted building permit and files in the office of the Clerk of Superior Court in each county wherein the real property to be improved is located, a completed and signed Notice of Contract form and the second or third tier subcontractor fails to serve upon the contractor a completed and signed Notice of Subcontract form by the same means of service as described in G.S. 44A-19(d); or

ii. After the posting and filing of a signed Notice of Contract and the service of a signed Notice of Subcontract, the contractor serves upon the second or third tier subcontractor, within five days following each subsequent payment, by the same means of service as described in G.S. 44A-19(d), the written notice of payment setting forth the date of payment and the period for which payment is made as requested in the Notice of Subcontract form set forth herein.

(2) The form of the Notice of Contract to be so utilized under this section shall be substantially as follows and the fee for filing the same with the Clerk of Superior Court shall be the same as charged for filing a Claim of Lien:

"NOTICE OF CONTRACT

"(1) Name and address of the Contractor:

"(2) Name and address of the owner of the real property at the time this Notice of Contract is recorded:

"(3) General description of the real property to be improved (street address, tax map lot and block number, reference to recorded instrument, or any other description that reasonably identifies the real property):

"(4) Name and address of the person, firm or corporation filing this Notice of Contract:

"Dated: ____________________

____
"Contractor

"Filed this the ______ day of __________, 19____.

____
Clerk of Superior Court"

(3) The form of the Notice of Subcontract to be so utilized under this section shall be substantially as follows:

"NOTICE OF SUBCONTRACT

"(1) Name and address of the subcontractor:

"(2) General description of the real property where the labor was performed or the material was furnished (street address, tax map lot and block number, reference to recorded instrument, or any description that reasonably identifies the real property):

"(3)

"(i) General description of the subcontractor's contract, including the names of the parties thereto:

"(ii) General description of the labor and material performed and furnished thereunder:

"(4) Request is hereby made by the undersigned subcontractor that he be notified in writing by the contractor of, and within five days following, each subsequent payment by the contractor to the first tier subcontractor for labor performed or material furnished at the improved real property within the above descriptions of such in paragraph (2) and subparagraph (3)(ii), respectively, the date payment was made and the period for which payment is made.

"Dated: ______________________

____
Subcontractor"

(4) The manner of such enforcement shall be as provided by G.S. 44A-7 through G.S. 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon the filing of a Claim of Lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the second or third tier subcontractor without his written consent. (1971, c. 880, s. 1; 1985, c. 702, s. 4; 1991 (Reg. Sess., 1992), c. 1010, s. 1; 1993, c. 553, s. 13.)

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective July 22, 1992, and applicable to actions filed on or after that date, inserted "perfection of" in the catchline, designated the former section as subsection (a), in subsection (a) added the catchline, and deleted "second or third" preceding "tier subcontractor" in the first sentence, and added subsection (b).

The 1993 amendment, effective July 24, 1993, in subdivision (b)(1)i deleted "of" preceeding "the building permit".

Legal Periodicals. — For survey on subcontractors' statutory lien rights, see 70 N.C.L. Rev. 1996 (1992).

CASE NOTES

Editor's Note. *— Most of the cases annotated below were decided prior to the 1992 amendment, which, inter alia, added subsection (b).*

The legislative intent was to continue the subcontractor's separate right in this section to a lien by subrogation to the contractor's lien on real property created by § 44A-8 (the contractor's lien). Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 403 S.E.2d 291 (1991).

Right of Subrogation Where Owner Has Paid Contractor for Specific Labor or Materials. — Even if the owner has specifically paid the contractor for the labor or materials supplied by the specific unpaid subcontractor who is claiming the lien, that subcontractor retains a right of subrogation, to the extent of his claim, to whatever lien rights the contractor otherwise has in the project. Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 403 S.E.2d 291 (1991).

Prior payment to intermediary first tier subcontractors does not bar claims of second tier subcontractors. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

As Tiered Subcontractor May Enforce Lien of General Contractor Under This Section. — This section expressly preserves the rights of a first, second or third tier subcontractor to enforce the lien of the general contractor. This construction is supported by the inclusion of the language that upon filing of the notice and claim of lien "no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent." This language, not found in § 44A-18, indicates that the legislature intended for the subcontractor to be secured by a mechanic's lien to the full extent of his claim. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

A second tier subcontractor has a

right to a mechanic's lien against the owner's property when the first tier subcontractor has been fully paid but the owner still owes money to the general contractor. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

Subcontractor May Assert Whatever Lien Contractor Has Against Owner. — Subcontractor may assert whatever lien that the contractor who dealt with the owner has against the owner's real property relating to the project. Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 403 S.E.2d 291 (1991).

Tiered Subcontractor Not Limited to Extent of Claim Under § 44A-18. — While it is true that this section expressly limits the tiered subcontractor's lien only "to the extent of his claim," this language does not mean "to the extent of his claim as permitted by § 44A-18." Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

Plaintiffs' liens on real property were limited by the amount remaining due on the contract; they were not permitted to assert liens on improved property for the full amount of their claims where that amount greatly exceeded the amount due on the contract. Vulcan Materials Co. v. Fowler Contracting Corp., 111 N.C. App. 919, 433 S.E.2d 462, appeal dismissed, 335 N.C. 565, 439 S.E.2d 163 (1993).

Quoted in Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

Part 3. Criminal Sanctions for Furnishing a False Statement in Connection with Improvement to Real Property.

§ 44A-24. (Effective October 1, 1994 — See editor's note) False statement a misdemeanor.

If any contractor or other person receiving payment from an obligor for an improvement to real property or from a purchaser for a conveyance of real property with improvements shall knowingly furnish to such obligor, purchaser, or to a lender who obtains a security interest in said real property, or to a title insurance company insuring title to such real property, a false written statement of the sums due or claimed to be due for labor or material furnished at the site of improvements to such real property, then such contractor, subcontractor or other person shall be guilty of a Class 1 misdemeanor. Upon conviction and in the event the court shall grant any defendant a suspended sentence, the court may in its discretion include as a condition of such suspension a provision that the defendant shall reimburse the party who suffered loss on such conditions as the court shall determine are proper.

The elements of the offense herein stated are the furnishing of the false written statement with knowledge that it is false and the subsequent or simultaneous receipt of payment from an obligor or purchaser, and in any prosecution hereunder it shall not be necessary for the State to prove that the obligor, purchaser, lender or title insurance company relied upon the false statement or that any person was injured thereby. (1971, c. 880, s. 1.1; 1973, c. 991; 1993, c. 539, s. 406; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and upon conviction shall be punished by a fine not exceeding one thousand dollars ($1,000) or by imprisonment not to exceed two years or by both such fine and imprisonment in the discretion of the court" at the end of the first sentence of the first paragraph.

ARTICLE 3.

Model Payment and Performance Bond.

§ 44A-25. Definitions.

Local Modification. — City of Durham: (As to Art. 3) 1991, c. 107.

For additional local modifications to this section, see the main pamphlet.

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 1010, s. 2 provides: "The General Statutes Commission shall conduct a study of statutory lien rights of contractors and subcontractors and payment and performance bonds under Articles 2 and 3 of Chapter 44A of the General Statutes and recommend to the General Assembly changes, modifications and revisions to those statutes as deemed appropriate, including, but not limited to, the matters addressed in the Third Edition to Senate Bill 597 (House Committee Substitute, adopted July 4, 1991), of the 1991 Session of the General Assembly and the interpretation of the law as set forth by the North Carolina Supreme Court in *Electric Supply Co. v. Swain Electrical Co., 328 NC 651 (1991)*, and to report its recommendations to the 1993 General Assembly."

Legal Periodicals. — For note, "Mechanics' Liens—Judicial Legislation at Work: Changes in the Mechanics' Lien Law of North Carolina after Electric Supply Co. v. Swain Electrical Co.," see 27 Wake Forest L. Rev. 1033 (1992).

CASE NOTES

Right of Materialman Who Furnishes Material to Subcontractor to Recover. — Neither actual delivery of material to a prime contract job site nor incorporation of the material into the work affects a materialman's right to recover under the contractor's payment bond; in order for a materialman who furnishes a subcontractor with materials for use on a public project to recover against a prime contractor's payment bond pursuant to this Article, it is only necessary that the materialman has sold and delivered the materials to the subcontractor in good faith and under the reasonable belief that these materials were for ultimate use under the prime contract. Syro Steel Co. v. Hubbell Hwy. Signs, Inc., 108 N.C. App. 529, 424 S.E.2d 208 (1993).

Where there was evidence that a materialman delivered material to a subcontractor in good faith and under the reasonable belief that the material was intended for use on the construction project, and where the subcontractor failed to present any evidence indicating that the materialman should have had reasonable grounds to believe that materials shipped to the subcontractor's warehouse were not intended for the project site, the trial court did not err in granting summary judgment in favor of the materialman against the contractor's payment bond for the materials shipped to the project site and to the warehouse. Syro Steel Co. v. Hubbell Hwy. Signs, Inc., 108 N.C. App. 529, 424 S.E.2d 208 (1993).

Applied in Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

§ 44A-26. Bonds required.

Cross References. — As to waiver of bonding requirements for Small Business Enterprises bids, see § 136-28.10.

§ 44A-27. Actions on payment bonds; service of notice.

CASE NOTES

Cited in Symons Corp. v. Insurance Co. of N. Am., 94 N.C. App. 541, 380 S.E.2d 550 (1989).

§ 44A-28. Actions on payment bonds; venue and limitations.

CASE NOTES

Parties cannot contract to shorten the one-year limitations period for payment bonds required by the public bond statute. However, in contrast to the provisions governing payment bonds, the public bond statute does not specify a limitations period for performance bonds. Town of Pineville v. Atkinson/Dyer/Watson Architects, 114 N.C. App. 497, 442 S.E.2d 73 (1994).

§ 44A-32. (Effective October 1, 1994 — See editor's note) Designation of official; violation a misdemeanor.

Each contracting body shall designate an official thereof to require the bonds described by this Article. If the official so designated shall fail to require said bond, he shall be guilty of a Class 1 misdemeanor. (1973, c. 1194, s. 1; 1993, c. 539, s. 407; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor".

§ 44A-35. Attorneys' fees.

In any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. For purposes of this section, "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or is a party defendant or third party defendant against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended. Notwithstanding the foregoing, in the event an offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a "prevailing party" is an offeree who obtains judgment in an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer. (1991 (Reg. Sess., 1992), c. 1010, s. 3; 1993 (Reg. Sess., 1994), c. 763, s. 1.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 1010, s. 4, as amended by Session Laws 1993 (Reg. Sess., 1994), c. 763, s. 1, makes this section effective upon ratification and applicable to actions filed on or after the date of ratification. The 1991 (Reg. Sess., 1992) act was ratified July 22, 1992.

Chapter 45.

Mortgages and Deeds of Trust.

Article 2.

Right to Foreclose or Sell under Power.

Sec.
45-16. Register of deeds to make marginal entry of substituted trustee.

Article 2A.

Sales under Power of Sale.

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Discharge and Release.

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ARTICLE 2.

Right to Foreclose or Sell under Power.

§ 45-16. Register of deeds to make marginal entry of substituted trustee.

Whenever any substituted trustee shall be appointed as provided in G.S. 45-10 through G.S. 45-17 and such designation of such substituted trustee shall have been registered, then it shall be the duty of the register of deeds to index the substitution of trustee as required by G.S. 161-14.1, indicating the place of registration of such appointment of a substituted trustee, and this shall be done as many times as a trustee may be substituted as provided for in G.S. 45-10 through G.S. 45-17. Whenever practical, the register of deeds may also make an appropriate notation on the margin of the registration of the mortgage, deed of trust, or other instrument securing the payment of money. It shall be competent for the holder of such deed of trust, or deeds of trust, mortgage or mortgages, wherein the same trustee is named, to execute one instrument applying to all such deeds of trust or mortgages, in the substitution of a trustee for any of the causes set forth in G.S. 45-10, and in said instrument to recite and name the mortgages and/or deeds of trust affected by giving the names of the grantors, the trustee and, if registered, the book and page of such registration. This may be done as many times as a trustee may be substituted as provided for in G.S. 45-10 through G.S. 45-17, and in which cases the register of deeds shall make, as to each recited instrument, mortgage or deed of trust, the notation provided for in this section. (1931, c. 78, s. 7; 1991, c. 114, s. 6; 1993, c. 425, s. 2.)

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, and applicable to fees collected and entries made on or after that date, twice in the first sentence and once in the last sentence substituted "through G.S." for "to"; and in the first sentence deleted "together with the certificates required in G.S. 45-10 to 45-17" preceeding "then it shall be", and substituted "index the substitution of trustee" for "record a separate instrument".

ARTICLE 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. Definitions; construction.

(a) The following definitions apply in this Article:

(1) "Resale" means a resale of real property or a resale of any leasehold interest created by a lease of real property held pursuant to G.S. 45-21.30.

(2) "Sale" means a sale of real property or a sale of any leasehold interest created by a lease of real property pursuant to (i) an express power of sale contained in a mortgage, deed of trust, leasehold mortgage, or leasehold deed of trust or (ii) a "power of sale", under this Article, authorized by other statutory provisions.

(b) The following constructions apply in this Article:

(1) The terms "mortgage" or "deed of trust" include leasehold mortgages or leasehold deeds of trust.

(2) The terms "mortgagee" or "trustee" include any person or entity exercising a power of sale pursuant to this Article.

(3) The terms "real property" or "property" include any leasehold interest created by a lease of real property. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1991, c. 255, s. 1; 1993, c. 305, s. 1.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, substituted "Definitions; construction" for "Definition" in the section catchline, added the subsection (a) designation, rewrote subsection (a) and added subsection (b). As to the applicability of this amendment, see the Editor's Note.

CASE NOTES

Cited in In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

§ 45-21.3: Repealed by Session Laws 1993, c. 305, s. 2, effective October 1, 1993, and applicable to instruments recorded prior to, on, or after that date.

§ 45-21.7. Sale of separate tracts in different counties.

(a) When the property to be sold consists of separate tracts of real property situated in different counties, there shall be a separate advertisement, sale and report of sale of the property in each county. The report of sale for the property in any one county shall be filed with the clerk of the superior court of the county in which such property is situated. The sale of each such tract shall be subject to separate upset bids. The clerk of the superior court of the county where the property is situated has jurisdiction with respect to upset bids of property situated within his county. To the extent the clerk deems necessary, the sale of each separate tract within his county, with respect to which an upset bid is received, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(b) The exercise of the power of sale with respect to a separate tract of property in one county does not extinguish or otherwise affect the right to exercise the power of sale with respect to tracts of property in another county to satisfy the obligation secured by the mortgage or deed of trust. (1949, c. 720, s. 1; 1993, c. 305, s. 3.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in subsection (a), in the third sentence, deleted "and each subsequent resale" following "The sale" and substituted "separate upset bids" for "a separate upset bid" and, in the fourth sentence, substituted "upset bids" for "resale" following "with respect to". As to the applicability of this amendment, see the Editor's Note.

§ 45-21.8. Sale as a whole or in parts.

(a) When the instrument pursuant to which a sale is to be held contains provisions with respect to whether the property therein described is to be sold as a whole or in parts, the terms of the instrument shall be complied with.

(b) When the instrument contains no provisions with respect to whether the property therein described is to be sold as a whole or in parts, the person exercising the power of sale may, in his discretion, subject to the provisions of G.S. 45-21.9, sell the property as a whole or in such parts or parcels thereof as are separately described in the instrument, or he may offer the property for sale by each method and sell the property by the method which produces the highest price.

(b1) When real property is sold in parts, the sale of any such part is subject to a separate upset bid; and, to the extent the clerk of superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(c) This section does not affect the equitable principle of marshaling assets. (1949, c. 720, s. 1; 1993, c. 305, s. 4.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, added subsection (b1). As to the applicability of this amendment, see the Editor's Note.

§ 45-21.9A. Simultaneous foreclosure of two or more instruments.

When two or more mortgages or deeds of trust held by the same person are secured in whole or in part by the same property, and there are no intervening liens, except for ad valorem taxes, between such mortgages or deeds of trust, the obligations secured by such mortgages or deeds of trust may be combined and the property sold once to satisfy the combined obligations if (i) powers of sale are provided in all such instruments; (ii) there is no provision in any such instrument which would not permit such a procedure; (iii) all the terms of all such instruments requiring compliance by the lender in connection with foreclosure sales are complied with; and (iv) all requirements of this Chapter governing power of sale foreclosures are met with respect to all such instruments. The proceeds of any sale shall be applied as provided in this Chapter. As between the combined obligations being foreclosed, proceeds shall be applied in the order of priority of the instruments securing them, and any deficiencies shall be determined accordingly. (1985, c. 515, s. 1; 1993, c. 305, s. 5.)

Editor's Note. —

Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, deleted "the same property secures" following "When" and inserted "are secured in whole or in part by the same property" following "person" in the first sentence. As to the applicability of this amendment, see the Editor's Note.

§ 45-21.10. Requirement of cash deposit at sale.

(a) If a mortgage or deed of trust contains provisions with respect to a cash deposit at the sale, the terms of the instrument shall be complied with.

(b) If the instrument contains no provision with respect to a cash deposit at the sale, the mortgagee or trustee may require the highest bidder immediately to make a cash deposit not to exceed the greater of five percent (5%) of the amount of the bid or seven hundred fifty dollars ($750.00).

(c) If the highest bidder fails to make the required deposit, the person holding the sale may at the same time and place immediately reoffer the property for sale. (1949, c. 720, s. 1; 1993, c. 305, s. 6.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in subsection (b) deleted "holding the sale of real property" following "the mortgagee or trustee" and substituted "the greater of five percent (5%) of the amount of the bid or seven hundred fifty dollars ($750.00)" for "ten percent (10%) of the amount of the bid up to and including one thousand dollars ($1,000), plus five percent (5%) of any excess over one thousand dollars ($1,000)". As to the applicability of this amendment, see the Editor's Note.

§ 45-21.15. Trustee's fees.

(a) When a sale has been held, the trustee is entitled to such compensation, if any, as is stipulated in the instrument.

(b) When no sale has actually been held, compensation for a trustee's services is determined as follows:

(1) If no compensation for the trustee's services in holding a sale is provided for in the instrument, the trustee is not entitled to any compensation;

(2) If compensation is specifically provided for the trustee's services when no sale is actually held, the trustee is entitled to such compensation;

(3) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, the trustee is entitled to compensation as follows: (i) one-fourth of the completed sale compensation before the trustee files the notice of hearing; (ii) one-half after the filing of the notice of hearing; and (iii) three-fourths after the hearing.

(4) Repealed by Session Laws 1993, c. 305, s. 7, effective October 1, 1993. (1949, c. 720, s. 1; 1993, c. 305, s. 7.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in subdivision (b)(3) substituted "to compensation as follows: (i) one-fourth of the completed sale compensation before the trustee files the notice of hearing; (ii) one-half after the filing of the notice of hearing; and (iii) three-fourths after the hearing" for "to such compensation as the parties agree upon", and deleted former subdivision (b)(4), which provided the method of the trustee's compensation when the parties were not able to agree. As to the applicability of this amendment, see the Editor's Note.

CASE NOTES

Amount Held Proper. — Under the express provisions of the deed of trust instrument, where foreclosure was "commenced, but not completed," trustee was entitled to a "partial commission" computed as five percent of the outstanding indebtedness or the minimum stated in the deed of trust (whichever is greater), and where mortgagor exercised his right of redemption, five percent of that amount was the proper trustee's commission to be paid. In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993).

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall file with the clerk of court a notice of hearing in accordance with the terms of this section. After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section. The notice shall specify a time and place for the hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. However, in those instances that publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of the hearing, and if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting the notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of hearing. Service by posting may run concurrently with any other effort to effect service. The notice shall be posted by the sheriff. In the event that the service is obtained by posting, an affidavit shall be filed with the clerk of court showing the circumstances warranting the use of service by posting.

If any party is not served or is not timely served prior to the date of the hearing, the clerk shall order the hearing continued to a date and time certain, not less than 10 days from the date scheduled for the original hearing. All notices already timely served remain effective. The mortgagee or trustee shall satisfy the notice requirement of this section with respect to those parties not served or not timely served with respect to the original hearing. Any party timely served, who has not received actual notice of the date to which the hearing has been continued, shall be sent the order of continuance by first-class mail at his last known address.

(b) Notice of hearing shall be served in a manner authorized in subsection (a) upon:

(1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.

(2) Any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.

(3) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county. The term "record owner" means any person owning a present or future interest in the real property, which interest is of record at the time that the notice of hearing is filed and would be affected by the foreclosure proceeding, but does not mean or include the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, judgment, mechanic's or materialman's lien, or other lien or security interest in the real property. Tenants in possession under

unrecorded leases or rental agreements shall not be considered record owners.

(c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:

(1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, original holder, and book and page of the security instrument.
(2) The name and address of the holder of the security instrument at the time that the notice of hearing is filed.
(3) The nature of the default claimed.
(4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.
(5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted.
(6) Repealed by Session Laws 1977, c. 359, s. 7.
(7) The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain a statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing and that his failure to attend the hearing will not affect his right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should he elect to do so.
(8) That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.
(8a) The name, address, and telephone number of the trustee or mortgagee.
(9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.
(10) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A.
(11) That the hearing may be held on a date later than that stated in the notice and that the party will be notified of any change in the hearing date.

(d) The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. In the event that the property to be sold consists of separate tracts situated in different counties or a single tract in more than one county, only one hearing shall be necessary. However, prior to that hearing, the mortgagee or trustee shall file the notice of hearing in any other county where any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. A certified copy of any authorization or order by the clerk shall be filed in any other county where any portion of the property to be sold is located before the mortgagee or trustee may proceed to advertise and sell any property located in that county. In the event that sales are to be held in more than one county, the provisions of G.S. 45-21.7 apply.

(d1) The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo. If an appeal is taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as the clerk deems adequate to protect the opposing party from any probable loss by reason of appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal.

(e) In the event of an appeal, either party may demand that the matter be heard at the next succeeding term of the court to which the appeal is taken which convenes 10 or more days after the hearing before the clerk, and such hearing shall take precedence over the trial of other cases except cases of exceptions to homesteads and appeals in summary ejectment actions, provided the presiding judge may in his discretion postpone such hearing if the rights of the parties or the public in any other pending case require that such case be heard first. In those counties where no session of court is scheduled within 30 days from the date of hearing before the clerk, either party may petition any regular or special superior court judge resident in a district or assigned to hold courts in a district where any part of the real estate is located, or the chief district judge of a district where any part of the real estate is located, who shall be authorized to hear the appeal. A certified copy of any order entered as a result of the appeal shall be filed in all counties where the notice of hearing has been filed.

(f) Waiver of the right to notice and hearing provided herein shall not be permitted except as set forth herein. In any case in which the original principal amount of indebtedness secured was one hundred thousand dollars ($100,000), or more, any person entitled to notice and hearing may waive the right to notice and hearing by written instrument signed and duly acknowledged by such party. In all other cases, at any time subsequent to service of the notice of hearing provided above, the clerk, upon the request of the mortgagee or trustee, shall mail to all other parties entitled to notice of such hearing a form by which such parties may waive their rights to the hearing. Upon the return of the forms to the clerk bearing the signatures of each such party and that of a witness to each such party's signature (which witness shall not be an agent or employee of the mortgagee or trustee), the clerk in his discretion may dispense with the necessity of a hearing and proceed to issue the order authorizing sale as set forth above.

(g) Any notice, order, or other papers required by this Article to be filed in the office of the clerk of superior court shall be filed in the same manner as a special proceeding. (1975, c. 492, s. 2; 1977, c. 359, ss. 2-10; 1983, c. 335, s. 1; 1983 (Reg. Sess., 1984), c. 1108, ss. 1, 2; 1993, c. 305, s. 8.)

Editor's Note. —

Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

The Rules of Civil Procedure, referred to in subsection (a), are codified at § 1A-1.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, rewrote subsection (a); in subsection (b), in the introductory language, substituted "served" for "given" and "upon" for "to"; in subdivision (b)(3), in the first sentence substituted "the notice of hearing is filed in that county" for "of giving notice", in the second sentence deleted "of record" following "or future interest", inserted a comma following "property", inserted "is of record at the time that the notice of hearing is filed and" following "which interest", inserted "judgment" following "deed of trust", and added the third sentence; in subdivision (c)(1) inserted "original holder" following "original amount"; in subdivision (c)(2) substituted "instrument at the time that the notice of hearing is filed" for "instrument, and if different from the original holder, his name and address"; added subdivision (c)(8a); added the second and fifth sentences of subsection (d); added the subsection (d1) designation; added the third sentence of subsection (e); in subsection (f), in the second sentence deleted "after default" following "and hearing may waive" and inserted "and duly acknowledged" following "by written instrument signed"; and added subsection (g). As to the applicability of this amendment, see the Editor's Note.

CASE NOTES

Editor's Note. — *Many of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Guaranty Agreements. — By its terms, this section and § 45-21.17 (the anti-deficiency statute) governs only the relationship between mortgagors and mortgagees, and is designed to protect interests in the property to be sold. Contract rights such as those in guaranty agreements do not fall within the coverage of those sections. Private third party guarantors of loans are not required by this section to give notice to those whose obligations they guarantee before seeking indemnity from them. Any notice requirement in such a situation is imposed by the contract between the parties, not by the antideficiency statute. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992).

Veterans Administration Subrogation and Indemnification Rights. — When pursuing its subrogation rights, the Veterans Administration must stand in the shoes of the private lender and meet any applicable state law requirements for recovery, but indemnity is an independent right arising under federal law, and is unaffected by state law. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

A superior court judge is not authorized to invoke equity jurisdiction in a hearing de novo, etc. —

The defense set forth in this section constitutes an affirmative defense within the meaning of Fed.R.Civ.P., Rule 8(c). Resolution Trust Corp. v. Southwest Dev. Co., 807 F. Supp. 375 (E.D.N.C. 1992).

No Valid Debt and No Default. — Where person executed notes and deed of trust based upon the understanding and for the specific consideration that no criminal proceedings would be instituted against her and criminal proceedings subsequently were instituted, the notes and deed of trust were without consideration, and the lower court was correct in finding (1) no valid debt existed and (2) there was no default on the notes or deed of trust, thereby properly disallowing the foreclosure proceeding. In re Kitchens, 113 N.C. App. 175, 437 S.E.2d 511 (1993).

Determining which property is legally secured by a deed of trust is a proper issue and element of proof before the Clerk of Superior Court. Therefore, if a party contends that the property is not secured, or should no longer be secured by the deed of trust, such contention may be raised as a defense to the four requisite findings under this section. In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

Foreclosure under a power of sale in a mortgage is not favored in the law, and its exercise by the mortgagee will be watched with jealousy. In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

The statutory scheme set forth in this section and § 45-21.17 applies directly to the Department of Veterans Affairs (VA) when it exercises its subrogation rights under state law to recover amounts paid to cover deficiencies after defaults on VA guaranteed loans. Under a subrogation theory, the VA's rights are the same as those of the lender who foreclosed, and thus are governed by state foreclosure law such as the North Carolina antideficiency statute. The VA therefore lost its right to subrogation against plaintiff-borrower when bank-lender failed to comply with the statutory notice requirements. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992).

Applied in In re Micheal Weinman Assocs. Gen. Partnership, 103 N.C. App. 756, 407 S.E.2d 288 (1991).

Quoted in Williamson v. Savage, 104 N.C. App. 188, 408 S.E.2d 754 (1991).

Cited in Goforth Properties, Inc. v. Birdsall, 334 N.C. 369, 432 S.E.2d 855 (1993); In re Earl L. Pickett Enters., Inc., 114 N.C. App. 489, 442 S.E.2d 101 (1994).

§ 45-21.16A. Contents of notice of sale.

The notice of sale shall —

(1) Describe the instrument pursuant to which the sale is held, by identifying the original mortgagors and recording data. If the record owner is different from the original mortgagors, the notice shall also list the record owner of the property, as reflected on the records of the register of deeds not more than 10 days prior to posting the notice. The notice may also reflect the owner not reflected on the records if known;

(2) Designate the date, hour and place of sale consistent with the provisions of the instrument and this Article;

(3) Describe the real property to be sold in such a manner as is reasonably calculated to inform the public as to what is being sold, which description may be in general terms and may incorporate the description as used in the instrument containing the power of sale by reference thereto. Any property described in the instrument containing the power of sale which is not being offered for sale should also be described in such a manner as to enable prospective purchasers to determine what is and what is not being offered for sale;

(4) Repealed by Session Laws 1967, c. 562, s. 2.

(5) State the terms of the sale provided for by the instrument pursuant to which the sale is held, including the amount of the cash deposit, if any, to be made by the highest bidder at the sale;

(6) Include any other provisions required by the instrument to be included therein;

(7) State that the property will be sold subject to taxes and special assessments if it is to be so sold; and

(8) State whether the property is being sold subject to or together with any subordinate rights or interests provided those rights and interests are sufficiently identified. (1949, c. 720, s. 1; 1951, c. 252, s. 1; 1967, c. 562, s. 2; 1975, c. 492, s. 1; 1987, c. 493; 1993, c. 305, s. 9.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in subdivision (1) substituted "data. In the record owner is" for "data, and if", inserted a comma and "the notice" following "mortgagors", inserted "also" preceding "list the record owner" and substituted "notice. The notice may also" for "notice, who may be identified as present owners, and may"; in the first sentence of subdivision (3) inserted "may" following "in general terms and"; added subdivision (8), and made related changes. As to the applicability of this amendment, see the Editor's Note.

§ 45-21.17. Posting and publishing notice of sale of real property.

In addition to complying with such provisions with respect to posting or publishing notice of sale as are contained in the security instrument,

(1) Notice of sale of real property shall
  a. Be posted, in the area designated by the clerk of superior court for posting public notices in the county in which the property is situated, at least 20 days immediately preceding the sale.
  b. And in addition thereto,
    1. The notice shall be published once a week for at least two successive weeks in a newspaper published and qualified for legal advertising in the county in which the property is situated.
    2. If no such newspaper is published in the county, then notice shall be published once a week for at least two successive weeks in a newspaper having a general circulation in the county.
    3. In addition to the required newspaper advertisement, the clerk may in his discretion, on application of any interested party, authorize such additional advertisement as in the opinion of the clerk will serve the interest of the parties, and permit the charges for such further advertisement to be taxed as a part of the costs of the foreclosure.

(2) When the notice of sale is published in a newspaper,
  a. The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than seven days, including Sundays, and
  b. The date of the last publication shall be not more than 10 days preceding the date of the sale.

(3) When the real property to be sold is situated in more than one county, the provisions of subdivisions (1) and (2) shall be complied with in each county in which any part of the property is situated.

(4) The notice of sale shall be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of the hearing provided by G.S. 45-21.16 whose address is known to the trustee or mortgagee and in addition shall also be mailed by first-class mail to any party desiring a copy of the notice of sale who has complied with G.S. 45-21.17A. Notice of the hearing required by G.S. 45-21.16 shall be sufficient to satisfy the requirement of notice un-

der this section provided such notice contains the information required by G.S. 45-21.16A.

(5) Repealed by Session Laws 1993, c. 305, s. 10, effective October 1, 1993.

(6) Any time periods relating to notice of hearing or notice of sale that are provided in the security instrument may commence with and run concurrently with the time periods provided in G.S. 45-21.16, 45-21.17, or 45-21.17A. (1949, c. 720, s. 1; 1965, c. 41; 1967, c. 979, s. 3; 1975, c. 492, s. 3; 1977, c. 359, ss. 11-14; 1985, c. 567, s. 1; 1993, c. 305, s. 10.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in subdivision (1)a. substituted "in the area designated by the clerk of superior court for posting public notices" for "at the courthouse door", and substituted "at least 20 days" for "for at least 15 days"; rewrote subdivision (1)b.1.; in subdivision (1)b.3. substituted "required newspaper advertisement" for "newspaper advertisement under 1 or 2 above"; in subdivision (4) substituted "G.S. 45-21.17A" for "subdivision (5) below"; repealed subdivision (5)a. through (5)g.; and in subdivision (6) substituted "G.S. 45-21.16, 45-21.17, or 45-21.17A" for "G.S. 45-21.16 or G.S. 45-21.17". As to the applicability of this amendment, see the Editor's Note.

CASE NOTES

Editor's Note. — *Many of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Where neither trustee nor bank knew grantor's current Florida address, the trustee had no obligation to mail notice of sale to her by first-class mail. Williamson v. Savage, 104 N.C. App. 188, 408 S.E.2d 754 (1991), decided prior to 1993 amendment.

Guaranty Agreements. — By its terms, § 45-21.16 and this section (the anti-deficiency statute) governs only the relationship between mortgagors and mortgagees, and is designed to protect interests in the property to be sold. Contract rights such as those in guaranty agreements do not fall within the statute's coverage. Private third party guarantors of loans are not required by the statute to give notice to those whose obligations they guarantee before seeking indemnity from them. Any notice requirement in such a situation is imposed by the contract between the parties, not by the antideficiency statute. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992).

Veterans Administration Subrogation and Indemnification Rights. — When pursuing its subrogation rights, the Veterans Administration must stand in the shoes of the private lender and meet any applicable state law requirements for recovery, but indemnity is an independent right arising under federal law, and is unaffected by state law. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

The statutory scheme set forth in § 45-21.16 and this section applies directly to the Department of Veterans Affairs (VA) when it exercises its subrogation rights under state law to recover amounts paid to cover deficiencies after defaults on VA guaranteed loans. Under a subrogation theory, the VA's rights are the same as those of the lender who foreclosed, and thus are governed by state foreclosure law such as the North Carolina antideficiency statute. The VA therefore lost its right to subrogation against plaintiff-borrower was lost when bank-lender failed to comply with the statutory notice requirements. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992).

§ 45-21.17A. Requests for copies of notice.

(a) Any person desiring a copy of any notice of sale may, at any time subsequent to the recordation of the security instrument and prior to the filing of notice of hearing provided for in G.S. 45-21.16, cause to be filed for record in the office of the register of deeds of each county where all or any part of the real property is situated, a duly acknowledged request for a copy of such notice of sale. This request shall be a separate instrument entitled "Request for Notice" and shall be signed and acknowledged by the party making the request, shall specify the name and address of the party to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation, and the book and page where the same is recorded, and shall be in substantially the following form:

"REQUEST FOR NOTICE"

In accordance with the provisions of G.S. 45-21.17A, request is hereby made that a copy of any notice of sale under the deed of trust (mortgage) recorded on ...., 19....., in Book ...., page ...., records of .... County, North Carolina, executed by .... as trustor (mortgagor), in which .... is named as beneficiary (mortgagee), and .... as trustee, be mailed to .... at the following address: ....

Signature: ....

[Acknowledgement]

(b) Register of Deeds' Duties. — Upon the filing for record of such request, the register of deeds shall index in the general index of grantors the names of the trustors (mortgagors) recited therein, and the names of the persons requesting copies, with a marginal entry in the index of the book and page of the recorded security instrument to which the request refers; or upon the filing for record of such request, the register of deeds may, instead of indexing such request on the general index of grantors, stamp upon the face of the security instrument referred to in the request the book and page of each request for notice thereunder.

(c) Mailing Notice. — The mortgagee, trustee, or other person authorized to conduct the sale shall at least 20 days prior to the date of the sale cause to be deposited in the United States mail an envelope with postage prepaid containing a copy of the notice of sale, addressed to each person whose name and address are set forth in the Request for Notice, and directed to the address designated in such request.

(d) Effect of Request on Title. — No request for a copy of any notice filed pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property, or be deemed notice to any person that the person requesting copies of notice has any claim or any right, title or interest in, or lien or charge upon, the property described in the deed of trust or mortgage referred to therein.

(e) Evidence of Compliance. — The affidavit of the mortgagee, trustee, or other person authorized to conduct the sale that copies of the notice of sale have been mailed to all parties filing requests for the same hereunder shall be deemed prima facie true. If on hearing it is proven that a party seeking to have the foreclosure sale set aside or seeking damages resulting from the foreclosure sale was mailed notice in accordance with this section or had actual notice of the sale before it was held (or if a resale was involved, prior to the date of the last resale), then the party shall not prevail. Costs, expenses, and reasonable attorneys' fees incurred by the prevailing party in any action to set aside the foreclosure sale or for damages resulting from the foreclosure sale shall be allowed as of course to the prevailing party.

(f) Action to Set Foreclosure Sale Aside for Failure to Comply. — A person entitled to notice of sale by virtue of this section shall not bring any action to set the sale aside on grounds that he was not mailed the notice of sale unless such action is brought prior to the filing of the final report and account as provided in G.S. 45-21.33, if the property was purchased by someone other than the secured party; or if brought by the secured party, unless such action is brought within six months of the date of such filing and prior to the time the secured party sells the property to a bona fide purchaser for value, if the property was purchased by the secured party. In either event, the party bringing such an action shall also tender an amount exceeding the reported sale price or the amount of the secured party's interest in the property, including all expenses and accrued interest, whichever is greater. Such tender shall be irrevocable pending final adjudication of the action.

(g) Action for Damages from Foreclosure Sale for Failure to Comply. — A person entitled to notice of sale by virtue of this section shall not bring any action for damages resulting from the sale on grounds that he was not mailed the notice unless such action is brought within six months of the date of the filing of the final report and account as provided in G.S. 45-21.33. The party bringing such an action shall also deposit with the clerk a cash or surety bond approved by the clerk and in such amount as the clerk deems adequate to secure the party defending the action for such costs, expenses, and reasonable attorneys' fees to be incurred in the action. (1993, c. 305, s. 11.)

Editor's Note. — Session Laws 1993, c. 305, s. 25 made this section effective October 1, 1993, and provides that the act applies to instruments recorded prior to, on, or after that date.

§ 45-21.20. Satisfaction of debt after publishing or posting notice, but before completion of sale.

CASE NOTES

Attorney's Fees Upheld. — When a trustee of a deed of trust who is also a licensed attorney performed such extraordinary services as described in § 32-51 in connection with a foreclosure proceeding, counsel was entitled under this section to an award of attorney's fees as an "expense[ ] incurred with respect to the sale or proposed sale ...." In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993).

Cited in Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993).

§ 45-21.21. Postponement of sale.

(a) Any person exercising a power of sale may postpone the sale to a day certain not later than 90 days, exclusive of Sunday, after the original date for the sale —

(1) When there are no bidders, or
(2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
(3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or
(4) When he is unable to hold the sale because of illness or for other good reason, or
(5) When other good cause exists.

The person exercising a power of sale may postpone the sale more than once whenever any of the above conditions are met, so long as the sale is held not later than 90 days after the original date for the sale.

(b) Upon postponement of a sale, the person exercising the power of sale shall personally, or through his agent or attorney —

(1) At the time and place advertised for the sale, publicly announce the postponement thereof;
(2) On the same day, attach to or enter on the original notice of sale or a copy thereof, posted at the courthouse door, as provided by G.S. 45-21.17, a notice of the postponement; and
(3) Give written or oral notice of postponement to each party entitled to notice of sale under G.S. 45- 21.17.

(c) The posted notice of postponement shall —

(1) State that the sale is postponed,
(2) State the hour and date to which the sale is postponed,
(3) State the reason for the postponement, and
(4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor or within 90 days of the date originally fixed for the sale, then prior to such sale taking place the provisions of G.S. 45-21.16 need not be complied with but the provisions of 45-21.16A, 45-21.17, and 45-21.17A shall be again complied with, or if on appeal, the appellate court orders the sale to be held, as to such sale so authorized the provisions of G.S. 45-21.16 need not be complied with again but those of G.S. 45-21.16A, 45-21.17, and 45-21.17A shall be.

(e) A sale may be postponed more than once provided the final postponed sale date is not later than 90 days, exclusive of Sunday and legal holidays, after the original date for the sale. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1975, c. 492, ss. 4-6; 1983, c. 335, s. 2; 1989, c. 257; 1991 (Reg. Sess., 1992), c. 777, s. 1; 1993, c. 305, s. 12.)

Editor's Note. —
Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective October 1, 1992, and applicable to foreclosure proceedings filed on or after that date, added the last paragraph in subsection (a).

The 1993 amendment, effective October 1, 1993, in subdivision (b)(1) deleted "and" from the end thereof and inserted "and" at the end of subdivision (b)(2); in subsection (d) substituted "sale taking place the provisions of G.S. 45-21.16 need not be complied with but the provisions of 45-21.16A, 45-21.17, and 45-21.17A shall be again complied with, or if on appeal, the appellate court orders" for "sale's taking place the provisions of G.S. 45-21.16, 45-21.16A and 45-21.17 shall be again complied with except that if on appeal from findings of the clerk pursuant to G.S. 45-21.16(d) and (e), the appellate court authorizes", and substituted "G.S. 45-21.16A, 45-21.17, and 45-21.17A" for "G.S. 45-21.16A and 45-21.17"; and added subsection (e). As to the applicability of this amendment, see the Editor's Note.

§ 45-21.22. Procedure upon dissolution of order restraining or enjoining sale, or upon lifting of automatic bankruptcy stay.

(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable.

(c) When, after the entry of any authorization or order by the clerk of superior court pursuant to G.S. 45-21.16 and before the expiration of the 10-day upset bid period, the foreclosure is stayed by the debtor filing a bankruptcy petition and thereafter the stay is lifted, the trustee or mortgagee shall not be required to comply with the provisions of G.S. 45-21.16, but shall advertise and hold the sale in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A. (1949, c. 720, s. 1; 1993, c. 305, s. 13.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, added "or upon lifting of automatic bankruptcy stay" to the section catchline and added subsection (c). As to the applicability of this amendment, see the Editor's Note.

§ 45-21.23. Time of sale.

A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place. The sale shall be held between the hours of 10:00 A.M. and 4:00 P.M. on any day other than Sunday or a legal holiday. (1949, c. 720, s. 1; 1993, c. 305, s. 14.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, deleted the subsection (a) designation, added the second sentence, and deleted former subsections (b) and (c) concerning time restrictions for a sale. As to the applicability of this amendment, see the Editor's Note.

§ 45-21.24. Continuance of uncompleted sale.

A sale commenced but not completed within the time allowed by G.S. 45-21.23 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday or a legal holiday. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 720, s. 1; 1993, c. 305, s. 15.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, added "or a legal holiday" to the end of the first sentence. As to the applicability of this amendment, see the Editor's Note.

§ 45-21.26. Preliminary report of sale of real property.

CASE NOTES

Cited in In re McDuffie, 114 N.C. App. 86, 440 S.E.2d 865 (1994).

§ 45-21.27. Upset bid on real property; compliance bonds.

(a) An upset bid is an advanced, increased, or raised bid whereby any person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price or last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars ($750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of sale or last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars ($750.00). The deposit required by this section shall be filed with the clerk of the superior court, with whom the report of the sale or the last notice of upset bid was filed by the close of normal business hours on the tenth day after the filing of the report of the sale or the last notice of upset bid, and if the tenth day shall fall upon a Sunday or legal holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid filed on the day following when said office is open for the regular dispatch of its business. Subject to the provisions of G.S. 45-21.30, there shall be no resales; rather, there may be successive upset bids each of which shall be followed by a period of 10 days for a further upset bid. When an upset bid is not filed following a sale, resale, or prior upset bid within the time specified, the rights of the parties to the sale or resale become fixed.

(b) The clerk of the superior court may require an upset bidder or the highest bidder at a resale held pursuant to G.S. 45-21.30 also to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The compliance bond shall be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond, less the amount of any required deposit. The compliance bond shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with the bid.

(c), (d) Repealed by Session Laws 1993, c. 305, s. 16, effective October 1, 1993.

(e) At the same time that an upset bid on real property is submitted to the court as provided for in subsection (a) above, together with a compliance bond if one is required, the upset bidder shall simultaneously file with the clerk a notice of upset bid. The notice of upset bid shall:

(1) State the name, address, and telephone number of the upset bidder;
(2) Specify the amount of the upset bid;
(3) Provide that the sale shall remain open for a period of 10 days after the date on which the notice of upset bid is filed for the filing of additional upset bids as permitted by law; and
(4) Be signed by the upset bidder or the attorney or the agent of the upset bidder.

(e1) When an upset bid is made as provided in this section, the clerk shall notify the trustee or mortgagee who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owner(s) of the property.

(f) When an upset bid is made as provided in this section, the last prior bidder, regardless of how the bid was made, shall be released from any further obligation on account of the bid and any deposit or bond provided by him shall be released.

(g) Any person offering to purchase real property by upset bid as permitted in this Article shall be subject to and bound by the terms of the original notice of sale except as modified by court order or the provisions of this Article.

(h) The clerk of superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have the authority to fix and determine all necessary procedural details with respect to upset bids in all instances in which this Article fails to make definite provisions as to that procedure. (1949, c. 720, s. 1; 1963, c. 377; 1967, c. 979, s. 3; 1993, c. 305, s. 16.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, rewrote subsections (a) and (b); repealed former subsections (c) and (d) concerning compliance bonds; and added subsections (e), (e1), (f), (g) and (h). As to the applicability of this amendment, see the Editor's Note.

CASE NOTES

New Hearing Improper. — Trial court erred in allowing trustee to hold a new hearing and sale in foreclosure proceeding which added a new deficiency debtor, after the assistant clerk had held a foreclosure hearing and sale, and the sale of the property had been confirmed by passage of the upset bid period. In re Earl L. Pickett Enters., Inc., 114 N.C. App. 489, 442 S.E.2d 101 (1994).

§ 45-21.28: Repealed by Session Laws 1993, c. 305, s. 17, effective October 1, 1993, and applicable to instruments recorded prior to, on, or after that date.

§ 45-21.29. Orders for possession.

(a) through (j) Repealed by Session Laws 1993, c. 305, s. 18, effective October 1, 1993.

(k) Orders for possession of real property sold pursuant to this Article, in favor of the purchaser and against any party or parties in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which such property is sold, when:

(1) Such property has been sold in the exercise of the power of sale contained in any mortgage, deed of trust, leasehold mortgage, leasehold deed of trust, or a power of sale authorized by any other statutory provisions,

(2) Repealed by Session Laws 1993, c. 305, s. 18, effective October 1, 1993.

(2a) The provisions of this Article have been complied with,

(3) The sale has been consummated, and the purchase price has been paid,

(4) The purchaser has acquired title to and is entitled to possession of the real property sold,

(5) Ten days' notice has been given to the party or parties who remain in possession at the time application is made, and

(6) Application is made by petition to such clerk by the mortgagee, the trustee, the purchaser of the property, or any such person's authorized representative.

(*l*) An order for possession issued pursuant to G.S. 45-21.29(k) shall be directed to the sheriff and shall authorize him to remove all occupants and their personal property from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. The purchaser shall have the same rights and remedies in connection with the execution of an order for possession and the disposition of personal property following execution as are provided to a landlord under North Carolina law, including Chapters 42 and 44A of the General Statutes.

(m) When the real property sold is situated in more than one county, the provisions of subsection (*l*) of this section shall be complied with in each county in which any part of the property is situated. (1949, c. 720, s. 1; 1951, c. 252, s. 3; 1965, c. 299; 1967, c. 979, s. 3; 1975, c. 492, ss. 7-9; 1987, c. 627, s. 3; 1993, c. 305, s. 18.)

Editor's Note. —
Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, deleted "Resale of real property; jurisdiction; procedure" from the section catchline; repealed subsections (a) through (j); rewrote subsections (k) and (*l*); and added subsection (m). As to the applicability of this amendment, see the Editor's Note.

§ 45-21.29A. No necessity for confirmation of sale.

No confirmation of sales or resales of real property made pursuant to this Article shall be required. If an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed. (1967, c. 979, s. 3; 1993, c. 305, s. 19.)

Editor's Note. —
Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in the section catchline substituted "No necessity" for "Necessity"; in the first sentence inserted "or resales" following "sales" and deleted "except as provided in G.S. 45-21.29(h) for resales" following "required"; and rewrote the second sentence. As to the applicability of this amendment, see the Editor's Note.

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.

(a) If the terms of a sale of real property require the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.

(b) Repealed by Session Laws 1967, c. 562, s. 2.

(c) When the highest bidder at a sale or resale or any upset bidder fails to comply with his bid upon tender to him of a deed for the real property or after a bona fide attempt to tender such a deed, the clerk of superior court may, upon motion, enter an order authorizing a resale of the real property. The procedure for such resale shall be the same in every respect as is provided by this Article in the case of an original sale of real property except that the provisions of G.S. 45-21.16 are not applicable to the resale.

(d) A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all the costs of the resale. Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for which the defaulting bidder remains liable under this section.

(e) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1975, c. 492, s. 10; 1977, c. 359, s. 15; 1993, c. 305, s. 20.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in subsection (c), in the first sentence substituted "or any upset bidder" for "of real property", inserted "real" preceding "property or after a bona fide" and substituted "such a deed, the clerk of superior court may, upon motion, enter an order authorizing a resale of the real property" for "such deed, the person authorized to sell the property may hold a resale" and, in the second sentence substituted "shall be" for "is" following "for such resale" and substituted "the resale" for "a resale, and the provisions of G.S. 45-21.29(b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale" at the end of the sentence; and in subsection (d), in the first sentence inserted "or any defaulting upset bidder" following "at any sale or resale", substituted "the costs of the resale" for "costs of such resale or resales", and added the second sentence. As to the applicability of this amendment, see the Editor's Note.

CASE NOTES

A judgment creditor lacks standing to bring an action against a defaulting bidder as that term was used under this section prior to the 1993 amendment. Union Grove Milling & Mfg. Co. v. Faw, 109 N.C. App. 248, 426 S.E.2d 476, aff'd per curium, 335 N.C. 165, 436 S.E.2d 131 (1993).

New Hearing Improper. — Trial court erred in allowing trustee to hold a new hearing and sale in foreclosure proceeding which added a new deficiency debtor, after the assistant clerk had held a foreclosure hearing and sale, and the sale of the property had been confirmed by passage of the upset bid period. In re Earl L. Pickett Enters., Inc., 114 N.C. App. 489, 442 S.E.2d 101 (1994).

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.

CASE NOTES

Cited in Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

§ 45-21.33. Final report of sale of real property.

(a) A person who holds a sale of real property pursuant to a power of sale shall file with the clerk of the superior court of the county where the sale is held a final report and account of his receipts and disbursements within 30 days after the receipt of the proceeds of such sale. Such report shall show whether the property was sold as a whole or in parts and whether all of the property was sold. The report shall also show whether all or only a part of the obligation was satisfied with respect to which the power of sale of property was exercised.

(b) The clerk shall audit the account and record it.

(c) The person who holds the sale shall also file with the clerk —

(1) A copy of the notices of sale and resale, if any, which were posted, and

(2) A copy of the notices of sale and resale, if any, which were published in a newspaper, together with an affidavit of publication thereof, if the notices were so published;

(3) Proof as required by the clerk, which may be by affidavit, that notices of hearing, sale and resale were served upon

all parties entitled thereto under G.S. 45-21.16, G.S. 45-21.17, [G.S.] 45-21.17A, and [G.S.] 45-21.30. In the absence of an affidavit to the contrary filed with the clerk, an affidavit by the person holding the sale that the notice of sale was posted in the area designated by the clerk of superior court for posting public notices in the county or counties in which the property is situated 20 days prior to the sale shall be proof of compliance with the requirements of G.S. 45-21.17(1)a.

(d) The clerk's fee for auditing and recording the final account is a part of the expenses of the sale, and the person holding the sale shall pay the clerk's fee as part of such expenses. (1949, c. 720, s. 1; 1975, c. 492, s. 11; 1983, c. 799; 1993, c. 305, s. 21.)

Editor's Note. —

Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in subdivision (c)(3), in the first sentence substituted "G.S. 45-21.17, 45-21.17A, and 45-21.30" for "45-21.17 and 45-21.29", and, in the second sentence deleted "prior to the order confirming the sale" following "contrary filed with the clerk" and substituted "in the area designated by the clerk of superior court for posting public notices" for "at the courthouse door". As to the applicability of this amendment, see the Editor's Note.

CASE NOTES

Cited in In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales on equitable grounds.

Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: Provided, that the court or judge enjoining such sale, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the appellate division from any such order or injunction. (1933, c. 275, s. 1; 1949, c. 720, s. 3; 1969, c. 44, s. 50; 1993, c. 305, s. 22.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in the section catchline deleted "or confirmations thereof" following "mortgage sales"; in the first sentence, substituted "time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale" for "confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, to enjoin such sale or the confirmation thereof" and, in the first proviso, deleted "or the confirmation thereof" following "enjoining such sale". As to the applicability of this amendment, see the Editor's Note.

CASE NOTES

Cited in Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993); Goforth Properties, Inc. v. Birdsall, 334 N.C. 369, 432 S.E.2d 855 (1993).

§ 45-21.35. Ordering resales; receivers for property; tax payments.

The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: Provided, the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the appellate division in all cases. (1933, c. 275, s. 2; 1949, c. 720, s. 3; 1969, c. 44, s. 51; 1993, c. 305, s. 23.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in the section catchline deleted "before confirmation" following "resales", and in the first sentence substituted "the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A" for "any sale is confirmed". As to the applicability of this amendment, see the Editor's Note.

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

CASE NOTES

Legislative Intent. —

The protection of this section is only available to those parties who hold a property interest in the mortgaged property and is not applicable to other parties liable on the underlying debt. Resolution Trust Corp. v. Southwest Dev. Co., 807 F. Supp. 375 (E.D.N.C. 1992).

Defense Not Available to Guarantors. —

The defense set out in this section is not available to guarantors — even when they are also property owners — if they are sued to enforce their duties as a guarantor. Poughkeepsie Sav. Bank v. Harris, 833 F. Supp. 551 (W.D.N.C. 1993).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

CASE NOTES

The purpose of the anti-deficiency statute is to prevent oppression of a purchase money debtor by a purchase money creditor. The purchase money debtor has both an equitable and statutory right to redeem. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Legislative Intent. —

The enactment of this section was intended to benefit and protect purchasers of real property. Adams v. Cooper, 114 N.C. App. 459, 442 S.E.2d 141 (1994).

Purchase Money Debtor Cannot Be Forced to Elect. — Except for ad valorem taxes, property assessments and property insurance premiums paid by the purchase money creditor on behalf of the purchase money debtor, a purchase money debtor cannot be forced to elect between paying an amount in excess of the balance purchase price secured by a purchase money deed of trust or forfeiting the property at foreclosure. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Nor Can Right of Redemption Be Conditioned on Payment of Additional Moneys. — A purchase money debtor's exercise of his right of redemption cannot be conditioned on the payment of additional moneys not secured by the purchase money deed of trust. To hold otherwise would be to make the purchase money debtor personally liable, a consequence the anti-deficiency statute prohibits. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Purchase Money Creditor Limited to Recovery of Property. — A purchase money deed of trust creditor cannot bring an action on the note to recover the purchase price either before or after foreclosure and is strictly limited to the property which was conveyed for purposes of securing the balance of the purchase price. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Purchase Money Instruments. —

Where property to be sold at foreclosure under a supplemental deed of trust was not the property conveyed for which a purchase money note and purchase money deed of trust were given, yet the debt to be satisfied was that reflected by the purchase money note, the provisions of supplemental deed of trust purporting to provide additional security for the purchase money note were unenforceable under this section. Goforth Properties, Inc. v. Birdsall, 334 N.C. 369, 432 S.E.2d 855 (1993).

In Personam Actions Not Barred for Unsecured Notes. — This statute does not act to bar an in personam action where the promissory note is unsecured. Wilkinson v. SRW/Cary

Assocs., 112 N.C. App. 846, 437 S.E.2d 3 (1993).

This section does not bar an in personam action against a non-mortgagor guarantor of a purchase money promissory note. Adams v. Cooper, 114 N.C. App. 459, 442 S.E.2d 141 (1994).

Fees of Attorneys of Purchase Money Creditor Not Secured. — Where a promissory note states on its face that it is "given as purchase money, and is secured by a purchase money deed of trust," and the note is incorporated by reference into the deed of trust, attorneys' fees are not part of the purchase price. Hence, even if the trustee were to foreclose on the purchase money deed of trust, the purchase money creditor's attorneys' fees would not be a secured obligation. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Duty to Mitigate Damages. — Plaintiffs were required to take only reasonable efforts to mitigate their damages; they were not required to attempt enforcement of either the note or the guaranty when a reasonable person would have concluded such efforts would be futile. Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

Holder of Subordinate Deed of Trust Cannot Bring In Personam Action. —

Anti-deficiency statute prohibits the holder of a second purchase money deed of trust from bringing an in personam action on the note for the debt even though the security has been "destroyed" by foreclosure of the first deed of trust. Paynter v. Maggiolo, 105 N.C. App. 312, 412 S.E.2d 691 (1992).

ARTICLE 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

§ 45-21.46. Validation of foreclosure sales where posting and publication not complied with.

CASE NOTES

Determination of Effect of Deed of Trust. — While the parties are before the clerk of court, the clerk should have the authority to determine not only whether there is a power of sale in the deed of trust, but also whether the property sought to be sold under foreclosure is still legally secured by the deed of trust. In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

ARTICLE 4.

Discharge and Release.

§ 45-37. Discharge of record of mortgages, deeds of trust and other instruments.

CASE NOTES

Editor's Note. *— The annotation to Woodcock v. Merrimon, 122 N.C. 731, 30 S.E. 321 (1898), which appears beneath the catchline* ***"Authority of Trustee to Cancel"*** *under this section in the main volume, is incorrect. The annotation should read:* ***"Authority of Trustee to cancel.*** *This section only empowers the trustee to 'acknowledge satisfaction of the provisions of such trust, etc.,' the entry operating as a reconveyance. It was never contemplated that the trustee could by this means release from an unsatisfied trust specified parts of the land.*

However, the creditor could be estopped, under certain circumstances, from enforcing his claim against that part of the land undertaken to be released by the trustee if the release was done with the creditor's consent and authority was properly shown. Woodcock v. Merrimon, 122 N.C. 731, 30 S.E. 321 (1898). See also, Browne v. Davis, 109 N.C. 23, 13 S.E. 703 (1891)."

§ 45-37.2. Recording satisfactions of deeds of trust and mortgages.

The register of deeds shall record the satisfaction and cancel the record of every deed of trust or mortgage satisfied by recording a record of satisfaction which shall consist of a separate instrument, or that part of the original deed of trust or mortgage rerecorded, reciting the names of all parties to the original instrument, the amount of the obligation secured, the date of satisfaction of the obligation, the appropriate entry of satisfaction as provided in G.S. 45-37, a reference by book and page number to the record of the instrument satisfied, and the date of recording the notice of satisfaction. Whenever it is practical to do so, the register of deeds may make a marginal notation in addition to making the recordation required by this section. (1963, c. 1021, s. 1; 1967, c. 765, s. 6; 1987, c. 620, s. 2; 1991, c. 114, s. 2; 1993, c. 425, s. 3.)

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, and applicable to fees collected and entries made on or after that date, deleted the next to last sentence, which read "The fee for recording a record of satisfaction shall be the fee for recording instruments in general provided in G.S. 161-10(a)(1)."

§ 45-38. Recording of foreclosure.

In case of foreclosure of any deed of trust, or mortgage, the trustee, mortgagee, or the trustee's or mortgagee's attorney shall record a notice of foreclosure and, whenever it is practical to do so, may also enter upon the margin of the record of the deed of trust or mortgage of the fact that such foreclosure and the date when, and the person to whom, a conveyance was made by reason of the foreclosure. In the event the entire obligation secured by a mortgage or deed of trust is satisfied by a sale of only a part of the property embraced within the terms of the mortgage or deed of trust, the trustee, mortgagee, or the trustee's or mortgagee's attorney shall indicate in the notice of foreclosure which property was sold and which was not sold, and may make an additional notation indicating the same, whenever practical.

A notice of foreclosure shall consist of a separate instrument, or that part of the original deed of trust or mortgage rerecorded, reciting the information required hereinabove, the names of all parties to the original instrument, the amount of the obligation secured, a reference by book and page number to the record of the instrument foreclosed, and the date of recording the notice of foreclosure. (1923, c. 192, s. 2; C.S., s. 2594(a); 1949, c. 720, s. 2; 1963, c. 1021, s. 2; 1971, c. 985; 1991, c. 114, s. 3; 1993, c. 305, s. 24.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in the first and second sentences of the first paragraph substituted "trustee, mortgagee, or the trustee's or mortgagee's attorney" for "trustee or mortgagee". As to the applicability of this amendment, see the Editor's Note.

ARTICLE 7.

Instruments to Secure Future Advances and Future Obligations.

§ 45-68. Requirements.

CASE NOTES

Effect of Agreement to Extend. — Where, under the explicit terms of savings and loan's deed of trust, the period within which owner's future obligations could be incurred expired on March 3, 1988, under the provisions of this section the only obligations incurred by the owner that related back to the recording date of the deed of trust were those incurred through March 3, 1988, and the obligations incurred after that date did not have seniority over plaintiff's intervening mechanic's lien. The agreement later made by owner and savings and loan to extend the term in which obligations could be incurred did not affect plaintiff's rights under the deed of trust as recorded. McNeary's Arborists, Inc. v. Carley Capital Group, 103 N.C. App. 650, 406 S.E.2d 644 (1991).

Cited in Richardson Corp. v. Barclays Am./Mtg. Corp., 111 N.C. App. 432, 432 S.E.2d 409 (1993).

§ 45-69. Fluctuation of obligations within maximum amount.

CASE NOTES

Applied in Richardson Corp. v. Barclays Am./Mtg. Corp., 111 N.C. App. 432, 432 S.E.2d 409 (1993).

§ 45-70. Priority of security instrument.

CASE NOTES

Future Advance Not Prioritized. — Because plaintiff corporate lender to farm partnership gave actual notice to additional lender that it had perfected a lien on farm property, the future advances made by additional lender to farm subsequent to the receipt of the notice and in excess of the cumulative amount initially stated in commitment letter was not obligatory and did "not take priority over" the plaintiff's loan. Richardson Corp. v. Barclays Am./Mtg. Corp., 111 N.C. App. 432, 432 S.E.2d 409, cert. denied, 335 N.C. 177, 438 S.E.2d 201 (1993).

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

Sec.
46-3. Petition by cotenant or personal representative of cotenant.

Article 2.

Partition Sales of Real Property.

Sec.
46-22. Sale in lieu of partition.
46-28. Sale procedure.
46-28.1. Petition for revocation of confirmation order.
46-28.2. When bidder may purchase.

ARTICLE 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Jurisdiction. — Where the parties invoked the jurisdiction of the district court to equitably distribute their marital property in an action for absolute divorce and equitable distribution of their marital property, the district court did not lose jurisdiction to equitably distribute the marital property because of its failure to enter a judgment in the equitable distribution case before the special proceeding seeking partition of the marital property was filed in the office of the clerk of superior court. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Superior court had no authority to partition marital property pursuant to the provisions of this section where the jurisdiction of the district court had been properly invoked to equitably distribute such marital property. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Dismissal of Appeal Held Error. — Where petitioners excepted to the commissioners' report under § 46-19, the trial court did not have the authority to dismiss the appeal due to petitioners failure to state specific grounds why the commissioners' report should not be confirmed. Jenkins v. Fox, 98 N.C. App. 224, 390 S.E.2d 683 (1990).

Cited in McDonald v. Medford, 111 N.C. App. 643, 433 S.E.2d 231 (1993).

§ 46-3. Petition by cotenant or personal representative of cotenant.

One or more persons claiming real estate as joint tenants or tenants in common or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G.S. 28A-17-3, may have partition by petition to the superior court. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C.S., s. 3215; 1963, c. 291, s. 2; 1985, c. 689, s. 16.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 28A-17-3" for "G.S. 28-81" near the end of the section.

§ 46-7. Commissioners appointed.

CASE NOTES

Cited in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 46-10. Commissioners to meet and make partition; equalizing shares.

CASE NOTES

Cited in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 46-19. Confirmation and impeachment of report.

CASE NOTES

Petitioners Not Required to State Specific Grounds. — Where petitioners excepted to the commissioners' report under this section, the trial court did not have the authority to dismiss the appeal due to petitioners' failure to state specific grounds why the commissioners' report should not be confirmed. Jenkins v. Fox, 98 N.C. App. 224, 390 S.E.2d 683 (1990).

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

(a) The court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.

(b) "Substantial injury" means the fair market value of each share in an in-kind partition would be materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.

(c) The court shall specifically find the facts supporting an order of sale of the property.

(d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3233; 1985, c. 626, s. 1.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote this section, which formerly read: "Whenever it appears by satisfactory proof that an actual partition of the land cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof."

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Failure of Court to Make Required Findings. — Where the trial court failed to make the findings of fact required by this section for partition by sale, that actual partition would result in one cotenant's share having less value than the share he would receive were the property partitioned by sale, and that actual partition would materially impair a cotenant's rights, since there was also no evidence in the record which would support such findings, the trial court's order of partition by sale was reversed. Partin v. Dalton Property Assocs., 112 N.C. App. 807, 436 S.E.2d 903 (1993).

Cited in Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

§ 46-28. Sale procedure.

(a) The procedure for a partition sale shall be the same as is provided in Article 29A of Chapter 1 of the General Statutes.

(b) The commissioners shall certify to the court that at least 20 days prior to sale a copy of the notice of sale was sent by first class mail to the last known address of all petitioners and respondents who previously were served by personal delivery or by registered or certified mail. The commissioners shall also certify to the court that at least ten days prior to any resale pursuant to G.S. 46-28.1(e) a copy of the notice of resale was sent by first class mail to the last known address of all parties to the partition proceeding who have filed a written request with the court that they be given notice of any resale. An affidavit from the commissioners that copies of the notice of sale and resale were mailed to all parties entitled to notice in accordance with this section shall satisfy the certification requirement and shall also be deemed prima facie true. If after hearing it is proven that a party seeking to revoke the order of confirmation of a sale or subsequent resale was mailed notice as required by this section prior to the date of the sale or subsequent resale, then that party shall not prevail under the provisions of G.S. 46-28.1(a)(2)a. and b. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3239; 1949, c. 719, s. 2; 1985, c. 626, s. 2; 1987, c. 282, s. 7.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, designated the first paragraph as subsection (a) and added subsection (b).

The 1987 amendment, effective June 4, 1987, in the second sentence of subsection (b), substituted "commissioners" for "Commissioner", and substituted "court" for "Court" in two places.

§ 46-28.1. Petition for revocation of confirmation order.

(a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the partition sale of real property shall not become final and effective until 15 days after entered. At any time before the confirmation order becomes final and effective, any party to the partition proceeding or the purchaser may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property upon the following grounds:

(1) In the case of a purchaser, a lien remains unsatisfied on the property to be conveyed.
(2) In the case of any party to the partition proceeding:
  a. Notice of the partition was not served on the petitioner for revocation as required by Rule 4 of the Rules of Civil Procedure; or
  b. Notice of the sale was not mailed to the petitioner for revocation as required by G.S. 46-28(b); or
  c. The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.

In no event shall the confirmation order become final or effective during the pendency of a petition under this section. No upset bid shall be permitted after the entry of the confirmation order.

(b) The party petitioning for revocation shall deliver a copy of the petition to all parties required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make such a sale and all parties required to be served under Rule 5 of G.S. 1A-1.

(c) In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed, if the purchaser proves by a preponderance of the evidence that:

(1) A lien remains unsatisfied on the property to be conveyed; and
(2) The purchaser has not agreed in writing to assume the lien; and
(3) The lien will not be satisfied out of the proceeds of the sale; and
(4) The existence of the lien was not disclosed in the notice of sale of the property, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of a lien.

(d) In the case of a petition brought pursuant to this section by a party to the partition proceeding, if the court finds by a preponderance of the evidence that petitioner has proven a case pursuant to a., b., or c. of subsection (a)(2), the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

(e) If the court revokes its order of confirmation under this section, the court shall order a resale pursuant to the provisions of G.S. 1-339.27. (1977, c. 833, s. 1; 1985, c. 626, ss. 3-7.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote subsection (a), substituted "party petitioning for revocation" for "purchaser" near the beginning of the first sentence of subsection (b), inserted "In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed" at the beginning of the introductory language of subsection (c), inserted "and" at the end of subdivisions (c)(1), (c)(2), and (c)(3), in subdivision (c)(4) substituted "any money or security" for "any moneys or security" and "pursuant to the offer" for "pursuant to his offer," added the second paragraph of subsection (c), rewrote subsection (d), which read: "The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of the lien," and added subsection (e).

§ 46-28.2. When bidder may purchase.

After the order of confirmation becomes final and effective, the successful bidder may immediately purchase the property. (1977, c. 833, s. 3; 1985, c. 626, s. 8.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote this section, which read: "After the order of confirmation has been entered, the successful bidder may immediately purchase the property upon which he bid; and upon the exercise of such election, the order of confirmation shall become final."

ARTICLE 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.

CASE NOTES

Applied in Chapman v. Vande Bunte, 604 F. Supp. 714 (E.D.N.C. 1985).

Chapter 47.

Probate and Registration.

Article 1.

Probate.

Sec.
47-3. [Repealed.]
47-7, 47-8. [Repealed.]
47-8.1. Certain documents verified by attorneys validated.
47-15. [Repealed.]

Article 2.

Registration.

47-17.2. Assignments of mortgages, deeds of trust, or other agreements pledging real property as security.
47-18.1. Registration of certificate of corporate merger or consolidation.
47-18.2. Registration of Inheritance and Estate Tax Waiver.
47-18.3. Execution of corporate instruments; authority and proof.
47-20. Deeds of trust, mortgages, conditional sales contracts, assignments of leases and rents; effect of registration.
47-30. Plats and subdivisions; mapping requirements.
47-31. Certified copies may be registered; used as evidence.
47-32. Photographic copies of plats, etc.
47-32.2. (Effective October 1, 1994 — See editor's note) Violation of § 47-30 or § 47-32 a misdemeanor.
47-36.1. Correction of errors in recorded instruments.

Article 3.

Forms of Acknowledgment, Probate and Order of Registration.

47-41. [Repealed.]
47-41.01. Corporate conveyances.
47-41.02. Other forms of probate for corporate conveyances.
47-46.1. Notice of satisfaction of deed of trust, mortgage, or other instrument.

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

47-48. Clerks' and registers of deeds' certificate failing to pass on all prior certificates.
47-50. Order of registration omitted.
47-51. Official deeds omitting seals.
47-53. Probates omitting official seals, etc.
47-53.1. Acknowledgment omitting seal of notary public.
47-54.1. Registration by register's assistants or deputies.
47-71.1. Corporate seal omitted prior to January 1, 1991.
47-100. Acknowledgments taken by officer who was grantor.
47-108.5. Validation of certain deeds executed in other states where seal omitted.
47-108.11. Validation of recorded instruments where seals have been omitted.
47-108.20. Validation of certain recorded instruments that were not acknowledged.
47-108.21. Sales for 1930 on dates other than first Monday in June validated.
47-108.22. Tax sales for 1931-32 on day other than law provides and certificates validated.
47-108.23. Tax sales for 1933-34 and certificates validated.
47-108.24. Notices of sale for taxes by publication validated.
47-108.25. Validation of sales and resales held pursuant to § 105-374.
47-108.26. Validation of reconveyances of tax foreclosed property by county boards of commissioners.

Article 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

47-112. (Effective October 1, 1994 — See editor's note) Forgery or alteration of discharge or certificate; punishment.

Article 6.

Registration and Execution of Instruments Signed under a Power of Attorney.

47-115.1. [Repealed.]

ARTICLE 1.

Probate.

§ 47-3: Repealed by Session Laws 1987, c. 620, s. 3, effective July 15, 1987.

§ 47-7: Repealed by Session Laws 1987, c. 620, s. 3, effective July 15, 1987.

§ 47-8: Repealed by Session Laws 1991, c. 543, s. 1, effective July 4, 1991.

§ 47-8.1. Certain documents verified by attorneys validated.

Final judgments otherwise proper, entered in actions or proceedings in which the complaints or any other documents were verified in violation of G.S. 47-8 prior to its repeal shall not be void or voidable. (1991, c. 543, s. 2.)

Editor's Note. — Session Laws 1991, c. 543, s. 4 made this section effective upon ratification. This section was ratified July 4, 1991.

Section 47-8 referred to in this section, was repealed by Session Laws 1991, c. 543, s. 1, effective July 4, 1991.

§ 47-14.1. Repeal of laws requiring private examination of married women.

CASE NOTES

Cited in North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987).

§ 47-15: Repealed by Session Laws 1985, c. 589, s. 26, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

ARTICLE 2.

Registration.

§ 47-17. Probate and registration sufficient without livery of seizin, etc.

Local Modification. — (As to Article 2) Mitchell: 1987, c. 537.

§ 47-17.2. Assignments of mortgages, deeds of trust, or other agreements pledging real property as security.

It shall not be necessary in order to effect a valid assignment of a note and deed of trust, mortgage, or other agreement pledging real property or an interest in real property as security for an obligation, to record a written assignment in the office of the register of deeds in the county in which the real property is located. A transfer of the promissory note or other instrument secured by the deed of trust, mortgage, or other security interest that constitutes an effective assignment under the law of this State shall be an effective assignment of the deed of trust, mortgage, or other security instrument. The assignee of the note shall have the right to enforce all obligations contained in the promissory note or other agreement, and all the rights of the assignor in the deed of trust, mortgage, or other security instrument, including the right to substitute the trustee named in any deed of trust, and to exercise any power of sale contained in the instrument without restriction. The provisions of this section do not preclude the recordation of a written assignment of a deed of trust, mortgage, or other security instrument, with or without the promissory note or other instrument that it secures, provided that the assignment complies with applicable law. (1993, c. 288, s. 4.)

Editor's Note. — Session Laws 1993, c. 288, s. 4, made this section effective upon ratification. The act was ratified July 6, 1993, and applies to assignments made on or after that date.

§ 47-18. Conveyances, contracts to convey, options and leases of land.

Legal Periodicals. —

For article, "Drafting, Interpreting, and Enforcing Commercial and Shopping Center Leases," see 14 Campbell L. Rev. 275 (1993).

CASE NOTES

I. In General.
III. What Instruments Affected.
IV. Persons Protected and Rights Thereof.
V. Notice.

I. IN GENERAL.

This section and § 47-20, etc. — The recording statute for deeds of trust, § 47-20, is virtually identical to this section, governing outright conveyances, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

This section and § 47-20 are not mere notice statutes for the protection of third parties. To the contrary, recordation is vital to the acquisition of ownership. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

The purpose of this section, etc. — The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Our recording statutes are intended to provide a single reliable means for purchasers to determine the state of the title to real estate. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Title Examiner Must Read Prior Conveyances. — In title examination when checking the grantor's out conveyances, it is not enough to merely insure that the subject property was not conveyed out previously. The title examiner must read the prior conveyances to determine that they do not contain restrictions applicable to the use of the subject property. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Principles applicable to sufficiency of references, etc. — In accord with the main volume. See Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985).

Rents Already Accrued and Rents Accruing in Future. — North Carolina recognizes a difference between rents which have already accrued and rents which will be accruing in the future. Already accrued rents are personalty (choses in action) while rents accruing in the future are incorporeal hereditaments — interests in real property. Thus the recordation of the deed of trust was necessary to perfect the security interest in rents accruing in the future. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

When a grantee accepts a conveyance subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the property burdened by that claim or interest; by accepting such a deed he ratifies the unrecorded instrument and agrees to take the property subject to it and is estopped to deny the unrecorded instrument's validity. This principle derives from the theory that reference to the unrecorded encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject to the encumbrance. Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985).

Applied in Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984).

Cited in Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Hornets Nest Girl Scout Council, Inc. v. Cannon Found., Inc., 79 N.C. App. 187, 339 S.E.2d 26 (1986); VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); In re Raleigh/Spring Forest Apts. Assocs., 118 Bankr. 42 (Bankr. E.D.N.C. 1990); In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

III. WHAT INSTRUMENTS AFFECTED.

Parol and Implied Trusts, etc. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

IV. PERSONS PROTECTED AND RIGHTS THEREOF.

State's Title Superior Where Intervenor's Interest Derived from Deed Recorded After Filing of Lis Pen-

dens. — Since the State's title to property derived from a Racketeer Influenced and Corrupt Organizations Act forfeiture proceeding related back to the date of the institution of the action when the notice of lis pendens was filed pursuant to § 75D-5, the State's title was superior to the interest of an intervenor which derived from a deed from her husband recorded after the institution of the RICO action, and after the filing of the notice of lis pendens. State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989).

Creditors Put Upon Same Plane as Purchasers. —

Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

V. NOTICE.

A purchaser has constructive notice of all duly recorded documents that a proper examination of the title should reveal. Stegall v. Robinson, 81 N.C. App 617, 344 S.E.2d 803 (1986).

Actual Knowledge Not Sufficient Notice of Restrictive Covenant. — It is well settled in the state that a restrictive covenant is not enforceable, either at law or in equity, against a subsequent purchaser of property burdened by the covenant unless notice of the covenant is contained in an instrument in his chain of title. Unlike in many states, actual knowledge, no matter how full and formal, is not sufficient to bind a purchaser in the state with notice of the existence of a restrictive covenant. Runyon v. Paley, 331 N.C. 293, 416 S.E.2d 177 (1992).

Notice of Restrictive Covenants Recorded with First Conveyance of Subdivision Lots. — Defendants had record notice of restrictive covenants governing a subdivision, where the covenants were not recorded as part of the subdivision plat, but were recorded with the first conveyance out of lots in the subdivision. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

§ 47-18.1. Registration of certificate of corporate merger or consolidation.

(a) If title to real property in this State is transferred by operation of law upon the merger or consolidation of two or more corporations, such transfer is effective against lien creditors or purchasers for a valuable consideration from the corporation formerly owning the property, only from the time of registration of a certificate thereof as provided in this section, in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

(b) The Secretary of State shall adopt uniform certificates of merger or consolidation, to be furnished for registration, and shall adopt such fees as are necessary for the expense of such certification. If the corporation involved is not a domestic corporation, a similar certificate by any competent authority in the jurisdiction of incorporation may be registered in accordance with this section.

(c) A certificate of the Secretary of State prepared in accordance with this section shall be registered by the register of deeds in the same manner as deeds, and for the same fees, but no formalities as to acknowledgment, probate, or approval by any other officer shall be required. The name of the corporation formerly owning the property shall appear in the "Grantor" index, and the name of the corporation owning the property by virtue of the merger or consolidation shall appear in the "Grantee" index. (1967, c. 950, s. 3; 1991, c. 645, s. 2(b).)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, added the second sentence of subsection (b).

§ 47-18.2. Registration of Inheritance and Estate Tax Waiver.

An Inheritance and Estate Tax Waiver or other consent to transfer issued by the Secretary of Revenue bearing the signature of the Secretary of Revenue or the official facsimile signature of the Secretary of Revenue may be registered by the Register of Deeds in the county or counties where the real estate described in the Inheritance and Estate Tax Waiver or consent to transfer is located in the same manner as deeds, and for the same fees, but no formalities as to acknowledgement, probate, or approval by an officer shall be required. The name of the decedent owning the real property at death shall appear in the "Grantor" index. Nothing herein shall require a personal representative or other person interested in the decedent's estate to register Inheritance and Estate Tax Waivers or consents to transfer. (1987, c. 548, s. 3.)

Editor's Note. — Session Laws 1987, c. 548, s. 4 made this section effective upon ratification. The act was ratified July 3, 1987.

§ 47-18.3. Execution of corporate instruments; authority and proof.

(a) Notwithstanding anything to the contrary in the bylaws or articles of incorporation, when it appears on the face of an instrument registered in the office of the register of deeds that the instrument was signed in the ordinary course of business on behalf of a domestic or foreign corporation by its chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial officer, and attested or countersigned by another person who is its secretary or an assistant secretary, (or, in the case of a bank, its secretary, assistant secretary, cashier, or assistant cashier), such an instrument shall be as valid with respect to the rights of innocent third parties as if executed pursuant to authorization from the board of directors, unless the instrument reveals on its face a potential breach of fiduciary obligation. The subsection shall not apply to parties who had actual knowledge of lack of authority or of a breach of fiduciary obligation.

(b) Any instrument registered in the office of the register of deeds, appearing on its face to be executed by a corporation, foreign or domestic, and bearing a seal which purports to be the corporate seal, setting forth the name of the corporation engraved, lithographed, printed, stamped, impressed upon, or otherwise affixed to the instrument, is prima facie evidence that the seal is the duly adopted corporate seal of the corporation, that it has been affixed as such by a person duly authorized so to do, that the instrument was duly executed and signed by persons who were officers or agents of the corporation acting by authority duly given by the board of directors, and that any such instrument is the act of the corporation, and shall be admissible in evidence without further proof of execution.

(c) Nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to express, implied, inherent or apparent authority, ratification, estoppel, or otherwise.

(d) Nothing in this section shall relieve corporate officers from liability to the corporation or from any other liability that they may have incurred from any violation of their actual authority.

(e) The Home Owners Loan Corporation or any corporation, the majority of whose stock is owned by the United States government, may convey lands or other property which is transferable by deed which is duly executed by either an officer, manager, or agent of said corporation, sealed with the common seal and has attached thereto a signed and attested resolution, under seal, of the board of directors of said corporation authorizing the said officer, manager, or agent to execute, sign, seal, and attest deeds, conveyances, or other instruments. This section shall be deemed to have been complied with if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority. All deeds, conveyances, or other instruments which have been heretofore or shall be hereafter so executed shall, if otherwise sufficient, be valid and shall have the effect to pass the title to the real or personal property described therein. (1991, c. 647, s. 2.)

Editor's Note. — Session Laws, 1991, c. 647, which enacted this section, in section 7 provides: "Sections 1 and 2 of this act are effective July 1, 1990, but shall not apply in any action or proceeding filed on or after July 1, 1990, and before the ratification of this act." The act was ratified on July 12, 1991.

§ 47-20. Deeds of trust, mortgages, conditional sales contracts, assignments of leases and rents; effect of registration.

(a) No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this Article; provided however that any transaction subject to the provisions of the Uniform Commercial Code (Chapter 25 of the General Statutes) is controlled by the provisions of that act and not by this section.

(b) For purposes of this section and G.S. 47-20.1, the following definitions apply:

(1) "Rents, issues, or profits" means all amounts payable by or on behalf of any lessee, tenant, or other person having a possessory interest in real estate on account of or pursuant to any written or oral lease or other instrument evidencing a possessory interest in real property or pursuant to any form of tenancy implied by law, and all amounts payable by or on behalf of any licensee or permittee or other person occupying or using real property under license or permission from the owner or person entitled to possession. The term shall not include farm products as defined in G.S. 25-9-109(3), timber, the proceeds from the sale of farm

products or timber, or the proceeds from the recovery or severance of any mineral deposits located on or under real property.

(2) "Assignment of leases, rents, issues, or profits" means every document assigning, transferring, pledging, mortgaging, or conveying an interest in leases, licenses to real property, and rents, issues, or profits arising from real property, whether set forth in a separate instrument or contained in a mortgage, deed of trust, conditional sales contract, or other deed or instrument of conveyance.

(3) "Collateral assignment" means any assignment of leases, rents, issues, or profits made and delivered in connection with the grant of any mortgage, or the execution of any conditional sales contract or deed of trust or in connection with any extension of credit made against the security of any interest in real property, where the assignor retains the right to collect or to apply such lease revenues, rents, issues, or profits after assignment and prior to default.

(c) The recording of a written document in accordance with G.S. 47-20.1 containing an assignment of leases, rents, issues, or profits arising from real property shall be valid and enforceable from the time of recording to pass the interest granted, pledged, assigned, or transferred as against the assignor, and shall be perfected from the time of recording against subsequent assignees, lien creditors, and purchasers for a valuable consideration from the assignor.

(d) Where an assignment of leases, rents, issues, or profits is a collateral assignment, after a default under the mortgage, deed of trust, conditional sales contract, or evidence of indebtedness which such assignment secures, the assignee shall thereafter be entitled, but not required, to collect and receive any accrued and unpaid or subsequently accruing lease revenues, rents, issues, or profits subject to the assignment, without need for the appointment of a receiver, any act to take possession of the property, or any further demand on the assignor. Unless otherwise agreed, after default the assignee shall be entitled to notify the tenant or other obligor to make payment to him and shall also be entitled to take control of any proceeds to which he may be entitled. The assignee must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections.

(e) This section shall not exclude other methods of creating, perfecting, collecting, sequestering, or enforcing a security interest in rents, issues, or profits provided by the law of this State. (1829, c. 20; R.C., c. 37, s. 22; Code, s. 1254; Rev., s. 982; 1909, c. 874, s. 1; C.S., s. 3311; 1953, c. 1190, s. 1; 1959, c. 1026, s. 2; 1965, c. 700, s. 8; 1967, c. 562, s. 5; 1991, c. 234, s. 1.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, and applicable to all assignments of leases, rents, issues, or profits, including collateral assignments, whether recorded prior to or after October 1, 1991, rewrote the catchline, which read: "Deeds of trust, mortgages, and conditional sales contracts; effect of registration"; designated the first paragraph as subsection (a); and added subsections (b), (c), (d), and (e).

CASE NOTES

I. In General.
II. Registration as Between Parties.
III. Persons Protected.
IV. Notice.

I. IN GENERAL.

The object of this section, etc. — The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

The purpose of this section is to prevent fraud, and liens registered under this Article are still subject to the common law of North Carolina for determination of their validity. The statute merely adds an additional requirement that a mortgagee must meet before successfully asserting an interest in rents and profits of a mortgaged property against third parties. It is designed to protect third parties. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990), aff'd sub nom. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

Section Intended Primarily to Protect, etc. — The General Assembly, by enacting the recording statutes, clearly intended that prospective purchasers should be able to safely rely on the public records. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

This section is merely a recording statute that serves to protect third parties by giving record notice of a purported interest. Recordation does not serve to add to the substantive rights of a purported lien holder. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990), aff'd sub nom. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

No distinction is made, etc. — Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Construction of This Section and § 47-18, etc. — This section, the recording statute for deeds of trust, is virtually identical to the statute governing outright conveyances, § 47-18, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Anyone at any time can register papers in compliance with this section, but such recordation does not create a perfected security interest. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990), aff'd sub nom. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

Recordation Necessary to Perfect Security Interest in Rents Accruing in Future. — North Carolina recognizes a difference between rents which have already accrued and rents which will be accruing in the future. Already accrued rents are personalty (choses in action) while rents accruing in the future are incorporeal hereditaments — interests in real property. Thus the recordation of the deed of trust was necessary to perfect the security interest in rents accruing in the future. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

Applied in In re Blanks, 64 Bankr. 467 (Bankr. E.D.N.C. 1986).

Cited in In re Raleigh/Spring Forest Apts. Assocs., 118 Bankr. 42 (Bankr. E.D.N.C. 1990).

II. REGISTRATION AS BETWEEN PARTIES.

Defendant was not a "party" to deed of trust for purposes of the rule that as between parties the instrument first executed, rather than the one first registered, has lien priority, where she signed the instrument merely to release her marital interest and did not incur any liability thereon as a grantor to plaintiff as a grantee. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Inapplicability of Registration Statutes to Parol and Constructive Trusts. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

III. PERSONS PROTECTED.

Mechanic's Lien for Work Done to Bring Property into Compliance with Restrictive Covenants. — Where it was undisputed that plaintiff first furnished labor or materials at lot for the purpose of bringing the property into compliance with the terms of applicable protective covenants on June 8, 1987, over a year after defendant's deed of trust on the property was recorded, plaintiff did not have priority over defendant and defendant was entitled to judgment as a matter of law. K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

IV. NOTICE.

Sections Not Mere Notice Statutes for Protection of Third Parties. — Section 47-18 and this section are not mere notice statutes for the protection of third parties. To the contrary, recordation is vital to the acquisition of ownership. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

No Mere Notice, etc. —

In accord with the main volume. See Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

The "witness" exception to the recordation requirement is not applicable in this jurisdiction. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Although bank which held a deed of trust had actual notice of a prior deed of trust, the doctrine of estoppel by deed did not operate to estop the bank from denying the earlier deed, where the earlier deed of trust lay outside of the chain of title of the grantor of the deed of trust. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.1. Place of registration; real property.

CASE NOTES

Cited in Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.2. Place of registration; personal property.

Legal Periodicals. —

For 1984 survey, "The Application of the North Carolina Motor Vehicle Act and the Uniform Commercial Code to the Sale of Motor Vehicles by Consignment," see 63 N.C.L. Rev. 1105 (1985).

§ 47-20.5. Real property; effectiveness of after-acquired property clause.

CASE NOTES

Legislative Intent. — The adoption of this section, which requires that after-acquired property clauses in security agreements be extended or re-recorded after each subsequent purchase of real property, indicates a legislative insistence that due recordation in the chain of title must remain the only effective means of protecting title. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-26. Deeds of gift.

CASE NOTES

Right-of-way deed which, besides reciting consideration as "One Dollar and other valuable consideration," contained a statement that the consideration for the conveyance was the obligation imposed upon grantees to maintain an all-weather driveway across the right-of-way, usable by all parties, was not without consideration, and the fact that the driveway was not maintained did not convert the deed, supported by consideration, into a deed of gift. Higdon v. Davis, 315 N.C. 208, 337 S.E.2d 543 (1985).

Applied in Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

Cited in Hayes v. Turner, 98 N.C. App. 451, 391 S.E.2d 513 (1990).

§ 47-27. Deeds of easements.

CASE NOTES

Applicability to Board of Transportation. — In accord with second paragraph in the main volume. DOT v. Auten, 106 N.C. App. 489, 417 S.E.2d 299 (1992).

Where a property interest spans more than one county, it is only effective against other claimants in the counties in which it has been recorded. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994).

Race to the Courthouse. — As North Carolina is a pure race jurisdiction, where defendants failed to register their grant of easement in Person County before plaintiffs registered their deed there, plaintiffs won the "race to the courthouse," and their interest superseded the later-recorded interest claimed by defendants. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994).

Purchaser for Value. — North Carolina does not require that a purchaser for valuable consideration be an "innocent purchaser." A "purchaser for value" or a "purchaser for valuable consideration" is simply defined as one who has paid a valuable consideration for the execution of an instrument of conveyance. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994).

§ 47-30. Plats and subdivisions; mapping requirements.

(a) Size Requirements. — All land plats presented to the register of deeds for recording in the registry of a county in North Carolina after September 30, 1991, having an outside marginal size of either 18 inches by 24 inches, 21 inches by 30 inches, or 24 inches by 36 inches, and having a minimum one and one-half inch border on the left side and a minimum one-half inch border on the other sides shall be deemed to meet the size requirements for recording under this section. Where size of land areas, or suitable scale to assure legibility require, plats may be placed on two or more sheets with appropriate match lines. Counties may specify either:

(1) Only 18 inches by 24 inches;
(2) A combination of 18 inches by 24 inches and 21 inches by 30 inches;
(3) A combination of 18 inches by 24 inches and 24 inches by 36 inches; or
(4) A combination of all three sizes.

Provided, that all registers of deeds where specific sizes other than the combination of all three sizes have been specified, shall be required to submit said size specifications to the North Carolina Association of Registers of Deeds for inclusion on a master list of all such counties. The list shall be available in each register of deeds office by October 1, 1991. For purposes of this section, the terms "plat" and "map" are synonymous.

(b) Plats to Be Reproducible. — Each plat presented for recording shall be a reproducible plat, either original ink on polyester film (mylar), or a reproduced drawing, transparent and archival (as defined by the American National Standards Institute), and submitted in this form. The recorded plat must be such that the public may obtain legible copies. A direct or photographic copy of each recorded plat shall be placed in the plat book or plat file maintained for that purpose and properly indexed for use.

(c) Information Contained in Title of Plat. — The title of each plat shall contain the following information: property designation, name of owner (the name of owner shall be shown for indexing purposes only and is not to be construed as title certification), location to include township, county and state, the date or dates the survey was made; scale or scale ratio in words or figures and bar graph; name and address of surveyor or firm preparing the plat.

(d) Certificate; Form. — There shall appear on each plat a certificate by the person under whose supervision such survey or such plat was made, stating the origin of the information shown on the plat, including recorded deed and plat references shown thereon. The ratio of precision before any adjustments must be shown. Any lines on the plat that were not actually surveyed must be clearly indicated and a statement included revealing the source of information. The execution of such certificate shall be acknowledged before any officer authorized to take acknowledgments by the registered land surveyor preparing the plat. All plats to be recorded shall be probated as required by law for the registration of deeds. Where a plat consists of more than one sheet, only one sheet must contain the certification and all other sheets must be signed and sealed.

The certificate required above shall include the source of information for the survey and data indicating the ratio of precision of the survey before adjustments and shall be in substantially the following form:

"I, ………, certify that this plat was drawn under my supervision from an actual survey made under my supervision (deed description recorded in Book ……, page …., etc.) (other); that the boundaries not surveyed are clearly indicated as drawn from information found in Book ……., page ….; that the ratio of precision as calculated is 1: ….; that this plat was prepared in accordance with

G.S. 47-30 as amended. Witness my original signature, registration number and seal this ...... day of ...., A.D., 19.....

....

Seal or Stamp

Surveyor

....

Registration Number"

The certificate of the Notary shall read as follows:

"North Carolina, ... County.

I, a Notary Public of the County and State aforesaid, certify that ...., a registered land surveyor, personally appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official stamp or seal, this ...... day of ......, 19.....

....

Seal or Stamp

Notary Public

My Commission expires ...."

Nothing in this requirement shall prevent the recording of a map that was prepared in accordance with a previous version of G.S. 47-30 as amended, properly signed, and notarized under the statutes applicable at the time of the signing of the map. However, it shall be the responsibility of the person presenting the map to prove that the map was so prepared.

(e) Method of Computation. — An accurate method of computation shall be used to determine the acreage and ratio of precision shown on the plat. Area by estimation is not acceptable nor is area by planimeter, area by scale, or area copied from another source, except in the case of tracts containing inaccessible sections or areas. In such case the surveyor may make use of aerial photographs or other appropriate aids to determine the acreage of such inaccessible areas when such areas are bounded by natural and visible monuments. In such case the methods used must be stated on the plat and all accessible areas of the tract shall remain subject to all applicable standards of this section.

(f) Plat to Contain Specific Information. — Every plat shall contain the following specific information:

(1) An accurately positioned north arrow coordinated with any bearings shown on the plat. Indication shall be made as to whether the north index is true, magnetic, North Carolina grid ("NAD 83" or "NAD 27"), or is referenced to old deed or plat bearings. If the north index is magnetic or referenced to old deed or plat bearings, the date and the source (if known) such index was originally determined shall be clearly indicated.

(2) The azimuth or course and distance of every property line surveyed shall be shown. Distances shall be in feet or meters and decimals thereof. The number of decimal places shall be appropriate to the class of survey required.

(3) All plat distances shall be by horizontal or grid measurements. All lines shown on the plat shall be correctly plotted to the scale shown. Enlargement of portions of a plat are acceptable in the interest of clarity, where shown as inserts. Where the North Carolina grid system is used the

grid factor shall be shown on the face of the plat. If grid distances are used, it must be shown on the plat.

(4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature to the point of tangency shall be shown as standard curve data, or as a traverse of bearings and distances around the curve. If standard curve data is used the bearing and distance of the long chord (from point of curvature to point of tangency) must be shown on the plat.

(5) Where a subdivision of land is set out on the plat, all streets and lots shall be accurately plotted with dimension lines indicating widths and all other information pertinent to reestablishing all lines in the field. This shall include bearings and distances sufficient to form a continuous closure of the entire perimeter.

(6) Where control corners have been established in compliance with G.S. 39-32.1, 39-32.2, 39-32.3, and 39-32.4, as amended, the location and pertinent information as required in the reference statute shall be plotted on the plat. All other corners which are marked by monument or natural object shall be so identified on all plats, and where practical all corners of adjacent owners along the boundary lines of the subject tract which are marked by monument or natural object shall be shown.

(7) The names of adjacent landowners, or lot, block, parcel, subdivision designations or other legal reference where applicable, shall be shown where they could be determined by the surveyor.

(8) All visible and apparent rights-of-way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown.

(9) Where the plat is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to and coordinated with a horizontal control monument of some United States or State Agency survey system, such as the North Carolina Geodetic Survey where such monument is within 2,000 feet of the subject property. Where the North Carolina Grid System coordinates of said monument are on file in the North Carolina Department of Environment, Health, and Natural Resources, the coordinates of both the referenced corner and the monuments used shall be shown in X (easting) and Y (northing) coordinates on the plat. The coordinates shall be identified as based on "NAD 83," indicating North American Datum of 1983, or as "NAD 27," indicating North American Datum of 1927. The tie lines to the monuments shall also be sufficient to establish true north or grid north bearings for the plat if the monuments exist in pairs. Within a previously recorded subdivision that has been tied to grid control, control monuments within the subdivision may be used in lieu of additional ties to grid control. Within a previously recorded subdivision that has not been tied to grid control, if horizontal control monuments are available within 2,000 feet, the above requirements shall be met; but in the interest of bearing consistency with

previously recorded plats, existing bearing control should be used where practical. In the absence of Grid Control, other appropriate natural monuments or landmarks shall be used. In all cases, the tie lines shall be sufficient to accurately reproduce the subject lands from the control or reference points used.

(10) A vicinity map (location map) shall appear on the plat.

(11) Notwithstanding any other provision contained in this section, it is the duty of the surveyor, by a certificate on the face of the plat, to certify to one of the following:

a. That the survey creates a subdivision of land within the area of a county or municipality that has an ordinance that regulates parcels of land;

b. That the survey is located in such portion of a county or municipality that is unregulated as to an ordinance that regulates parcels of land;

c. That the survey is of an existing parcel or parcels of land;

d. That the survey is of another category, such as the recombination of existing parcels, a court-ordered survey, or other exception to the definition of subdivision;

e. That the information available to the surveyor is such that the surveyor is unable to make a determination to the best of his or her professional ability as to provisions contained in (a) through (d) above.

However, if the plat contains the certificate of a surveyor as stated in a., d., or e. above, then the plat shall have, in addition to said surveyor's certificate, a certification of approval, or no approval required, as may be required by local ordinance from the appropriate government authority before the plat is presented for recordation. If the plat contains the certificate of a surveyor as stated in b. or c. above, nothing shall prevent the recordation of the plat if all other provisions have been met.

(g) Recording of Plat. — For purposes of recording, the register of deeds shall not be responsible for:

(1) The provisions of subsection (b), as to archival;

(2) The provisions of subsection (d), except for the notary certificate;

(3) The provisions of subsection (e); or

(4) The provisions of subdivisions (2) through (9) of subsection (f).

A plat, when proven and probated as provided herein for deeds and other conveyances, when presented for recording, shall be recorded in the plat book or plat file and when so recorded shall be duly indexed. Reference in any instrument hereafter executed to the record of any plat herein authorized shall have the same effect as if the description of the lands as indicated on the record of the plat were set out in the instrument.

(h) Nothing in this section shall be deemed to prevent the filing of any plat prepared by a registered land surveyor but not recorded prior to the death of the registered land surveyor. However, it is the responsibility of the person presenting the map to prove that the plat was so prepared. For preservation these plats may be filed without signature, notary acknowledgement or probate, in a special plat file.

(i) Nothing in this section shall be deemed to invalidate any instrument or the title thereby conveyed making reference to any recorded plat.

(j) The provisions of this section shall not apply to boundary plats of areas annexed by municipalities nor to plats of municipal boundaries, whether or not required by law to be recorded.

(k) The provisions of this section shall apply to all counties in North Carolina. Where local law is in conflict with this section, the provisions in this section shall apply. Failure of a plat to conform in all requirements of this statute shall be sufficient grounds for the register of deeds to refuse to accept the plat for recordation.

(*l*) The provisions of this section shall not apply to the registration of highway right-of-way plans provided for in G.S. 136-19.4 nor to registration of roadway corridor official maps provided in Article 2E of Chapter 136.

(m) Except as provided in subsection (n), any map submitted for inclusion on the public record, whether submitted alone or attached to a deed or other instrument, shall be prepared by a registered land surveyor. Such a map shall either (i) have an original personal signature and original seal as approved by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors or (ii) be a copy of a map, already on file in the public record, that is certified by the custodian of the public record to be a true and accurate copy of a map bearing an original personal signature and original seal. The presence of the original personal signature and seal shall constitute a certification that the map conforms to the standards of practice for land surveying in North Carolina, as defined in the rules of the North Carolina State Board of Registration for Professional Engineers and Land Surveyors.

(n) A map that does not meet the requirements of subsection (m) of this section may be attached to a deed or other instrument submitted for inclusion in the public record only for illustrative purposes and only if the map is conspicuously labelled, "THIS MAP IS NOT A CERTIFIED SURVEY AND NO RELIANCE MAY BE PLACED IN ITS ACCURACY." (1911, c. 55, s. 2; C.S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1; 1967, c. 228, s. 2; c. 394; 1971, c. 658; 1973, cc. 76, 848, 1171; c. 1262, s. 86; 1975, c. 192; c. 200, s. 1; 1977, c. 50, s. 1; c. 221, s. 1; c. 305, s. 2; c. 771, s. 4; 1979, c. 330, s. 1; 1981, c. 138, s. 1; c. 140, s. 1; c. 479; 1983, c. 473; 1987, c. 747, s. 20; 1989, c. 727, s. 218(6); 1991, c. 268, s. 3; 1993, c. 119, ss. 1, 2.)

Editor's Note. —

Session Laws 1987, c. 747, s. 25 provides that as used in c. 747, which amended subdivision (*l*), the word "municipality" means a "city" as defined by § 160A-1.

Session Laws 1987, c. 747, s. 26 is a severability clause.

Session Laws 1991 (Reg. Sess., 1992), c. 1030, s. 51.16 provides: "The General Statutes Commission will study the requirements of G.S. 47-30(m) and G.S. 89C-26 to determine whether it is possible to provide for a photographic copy of a map to be attached to a deed or other instrument without requiring an original personal signature and original seal as approved by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors, while still protecting the public and assuring that maps have not been altered prior to submission for recording. The General Statutes Commission shall report its findings and recommendations to the 1993 General Assembly and shall submit its report not later than January 31, 1993 to the President Pro Tempore of the Senate and the Speaker of the House of Representatives."

Effect of Amendments. —

The 1987 amendment, effective August 7, 1987, added "nor to registration of roadway corridor official maps provided in Article 2E of Chapter 136" at the end of subdivision (*l*).

The 1989 amendment, effective July 1, 1989, substituted "Environment, Health, and Natural Resources" for "Natural Resources and Community Development" in the second sentence of subdivision (f)(9).

The 1991 amendment, effective October 1, 1991, rewrote subsections (a), (b), (c), (d) and (f); in subsection (e) substituted "copied" for "copies" in the second sentence, and in the last sentence substituted "In such case the" for "The," deleted "fully" after "must be," deleted "and explained" after "stated," and deleted "face of the" before "plat and all accessible areas"; in subsection (g) inserted the introductory language and subdivisions (1), (2), (3), and (4); in subsection (h) inserted the second sentence and in the last sentence inserted "signature"; in subsection (k) deleted "100" preceding "counties in North Carolina"; and added subsection (m).

Session Laws 1993, c. 119, s. 1, effective October 1, 1993, rewrote subsection (m).

Session Laws 1993, c. 119, s. 2, effective October 1, 1993, added subsection (n).

OPINIONS OF ATTORNEY GENERAL

This section applies only to those maps or plats presented to the Register of Deeds for recording in his office. Whether or not the plat or map should be made to comply with this section and recorded depends on the purpose for which it is to be used. See opinion of Attorney General to Mr. Joe B. Freeman, Register of Deeds, Robeson County, 59 N.C.A.G. 1 (1989).

§ 47-31. Certified copies may be registered; used as evidence.

(a) A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county without further certification pursuant to G.S. 47-14; and the registered or duly certified copy of any deed or writing that has been registered in the county where the land is situate may be given in evidence in any court of the State.

(b) Instruments registered pursuant to this section prior to July 6, 1993 that were not further certified pursuant to G.S. 47-14 at the time of registration are hereby validated. (1858-9, c. 18, s. 2; Code, s. 1253; Rev., s. 988; C. S., s. 3319; 1993, c. 288, ss. 2, 3.)

Editor's Note. — This section has been set out in the form above at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 1993, c. 288, s. 2, effective July 6, 1993, and applicable to assignments made on or after that date, in present subsection (a), substituted "county without further certification pursuant to G.S. 47-14;" for "county;" and "registered" for "registry" and inserted "when that has been" following "any deed or writing".

Session Laws 1993, c. 288, s. 3, effective July 6, 1993, and applicable to assignments made on or after that date, added present subsection (b).

§ 47-32. Photographic copies of plats, etc.

After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2; 1971, c. 1185, s. 13; 1977, c. 111; c. 221, s. 2; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 1.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, deleted the reference to Brunswick County in the second paragraph.

§ 47-32.2. (Effective October 1, 1994 — See editor's note) Violation of § 47-30 or § 47-32 a misdemeanor.

Any person, firm or corporation willfully violating the provisions of G.S. 47-30 or G.S. 47-32 shall be guilty of a Class 3 misdemeanor and upon conviction shall be subject only to a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1959, c. 1235, ss. 3, 3A, 3.1; 1961, cc. 7, 111, 164, 252; c. 535, s. 1; cc. 687, 932, 1122; 1963, c. 236; c. 361, s. 3; 1965, c. 139, s. 3; 1977, c. 110; c. 221, s. 3; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 2; 1993, c. 539, s. 408; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, deleted the reference to Brunswick County in the second paragraph.

The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 3" preceding "misdemeanor" and inserted "only" following "shall be subject" in the first paragraph.

§ 47-36.1. Correction of errors in recorded instruments.

Notwithstanding G.S. 47-14 and 47-17, an obvious typographical or other minor error in a deed or other instrument recorded with the register of deeds may be corrected by rerecording the original instrument with the correction clearly set out on the face of the instrument and with a statement of explanation attached. The parties who signed the original instrument or the attorney who drafted the original instrument shall initial the correction and sign the statement of explanation. If the statement of explanation is not signed by the parties who signed the original instrument, it shall state that the person signing the statement is the attorney who drafted the original instrument. The statement of explanation need not be acknowledged. Notice of the correction made pursuant to this section shall be effective from the time the instrument is rerecorded. (1985 (Reg. Sess., 1986), c. 842, s. 1; 1987, c. 360, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 made this section effective upon ratification and provided that it would not affect pending litigation. The act was ratified June 30, 1986.

Effect of Amendments. — The 1987 amendment, effective June 12, 1987, and applicable to corrections made on or after that date, inserted the present third sentence.

CASE NOTES

Quoted in Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

ARTICLE 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. Certificate and adjudication of registration.

Local Modification. — Martin County: 1987 (Reg. Sess., 1988), c. 925.

§ 47-38. Acknowledgment by grantor.

CASE NOTES

Acknowledgment in Compliance with Section. — An acknowledgment to a will, upon which the name and title of the official taking the acknowledgment and the name of the maker as well as the witness was provided, their personal appearance was ascribed by the phrase "sworn to ... before me", the date and year of the acknowledgment were provided, the notary's signature and her seal were affixed thereto, and the phrase "sworn to and subscribed before me" appeared prominently below the signatures of the maker and witness, substantially conformed to the statutory provisions of this section. In re Hess, 104 N.C. App. 75, 407 S.E.2d 594 (1991).

§ 47-41: Repealed by Session Laws 1991, c. 647, s. 3, effective October 1, 1991.

Cross References. — As to corporate conveyances, see now §§ 47-41.01, 47-41.02.

Editor's Note. — Session Laws, 1991, c. 647, s. 3, which repealed this section, provides: "The provision of G.S. 47-41 shall continue to apply to all instruments executed before the effective date [October 1, 1991] of this section of this act."

§ 47-41.01. Corporate conveyances.

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the deed or other instrument is executed by the corporation's chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial officer signing the name of such corporation by him as such officer, is sealed with its common or corporate seal, and is attested by another person who is its secretary or assistant secretary, trust officer, assistant trust officer, associate trust officer, or, in case of a bank, its secretary, assistant secretary, cashier, or assistant cashier, the following form of acknowledgment is sufficient:

....
(State and county, or other
description of place where
acknowledgment is taken)
I, ..., ...,
(Name of officer taking acknowledgment) (Official title of officer taking acknowledgment)
certify that .... personally came before
(Name of secretary, assistant secretary, trust officer, assistant trust officer, cashier or assistant cashier)
me this day and acknowledged that he (or she) is ....
(Secretary, assistant secretary, trust officer, assistant trust officer, cashier or assistant cashier)
of ...., a corporation, and that by authority duly
(Name of corporation)
given and as the act of the corporation, the foregoing instrument was signed in its name by its ....,
(Chairman, president, chief executive officer, vice-president, assistant vice-president, treasurer, or chief financial officer)
sealed with its corporate seal, and attested by himself (or herself) as

its ....

(Secretary, assistant secretary,
trust officer, assistant trust officer,
cashier or assistant cashier)

My commission expires ....

(Date of expiration of commission as
notary public)

Witness my hand and official seal, this the .... day of
...........,
(Month)
....
(Year)

....
(Signature of officer taking acknowledgment)

(Official seal, if officer taking
acknowledgment has one)

(1) The words "a corporation" following the blank for the name of the corporation may be omitted when the name of the corporation ends with the word "Corporation" or "Incorporated."

(2) The words "My commission expires" and the date of expiration of the notary public's commission may be omitted except when a notary public is the officer taking the acknowledgment.

(3) The words "and official seal" and the seal itself may be omitted when the officer taking the acknowledgment has no seal or when such officer is the clerk, assistant clerk, or deputy clerk of the superior court of the county in which the deed or other instrument acknowledged is to be registered. (1991, c. 647, s. 4.)

Editor's Note. — Session Laws, 1991, c. 647, s. 7, made this section effective October 1, 1991.

§ 47-41.02. Other forms of probate for corporate conveyances.

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall also be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, ... County.

This ...... day of .... A.D. ...., personally came before me (here give the name and official title of the officer who signs this certificate) A.B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C.D., who is the president (or presiding member or trustee), and also with E.F. and G.H., two other members of said corporation; and that he, the said A.B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation

thereto, and that he, the said subscribing witness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this ...... day of .... (year).
(Official seal.)

....
(Signature of officer.)

(c) If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

North Carolina, ... County.

This ...... day of ......, A.D. ...., personally came before me (here give name and official title of the officer who signs the certificate) A.B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C.D., who is the president of said corporation, and that he, the said A.B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A.B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A.B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the .... day of ...... (year).
(Official seal.)

....
(Signature of officer.)

North Carolina, ... County.

This is to certify that on the ...... day of ......, 19...., before me personally came .... (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that ...... is the president (or vice-president), and ...... is the secretary (or assistant secretary) of the ......, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ...... day of ...... (year).
(Official seal.)

....
(Signature of officer.)

(d) If the deed or other instrument is executed by the signature of the president, vice-president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This ...... day of ......, A.D. ...., personally came before me (here give name and official title of officer who signs the certificate) A.B., who, being by me duly sworn, says that he is president (vice-president, presiding member or trustee) of the ...... Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of said company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A.B. acknowledged the said writing to be the act and deed of said corporation.

(Official seal.)

....
(Signature of officer.)

(e) All corporate conveyances probated and recorded prior to February 14, 1939, wherein the same was attested by the assistant secretary, instead of the secretary, and otherwise regular, are hereby validated as if attested by the secretary of the corporation.

(f) The following forms of probate for contracts in writing for the purchase of personal property by corporations providing for a lien on the property or the retention of a title thereto by the vendor as security for the purchase price or any part thereof, or chattel mortgages, chattel deeds of trust, and conditional sales of personal property executed by a corporation shall be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law:

North Carolina
.... County

I, ..., do hereby certify that ....
(Name of president,
secretary or treasurer)
personally came before me this day and acknowledged that he is
.... of .... and acknowledged,
(President, secretary or treasurer) (Name of corporation)
on behalf of ...., the grantor, the due
(Name of corporation)
execution of the foregoing instrument.

Witness my hand and official seal, this ..... day of ....., 19.....

(Official seal)

....
(Title of officer)

....
(Name of state)
....
(County)

I, ...
(Name of officer taking proof) (Official title of officer taking proof)
of ...., certify that
(County) (Name of state)
.... personally appeared before
(Name of subscribing witness)
me, and being duly sworn, stated that in his presence
....
(Name of president, secretary or treasurer of maker)

(signed the foregoing instrument) (acknowledged the execution of the foregoing instrument.) (Strike out the words not applicable.)

Witness my hand and official seal, this .... day of ...., 19........

(Month) (Year)

....

(Signature of official taking proof)

....

(Official title of official taking proof)

My commission expires ....

(Date of expiration of official's commission)

(g) All deeds and other conveyances executed on or before April 12, 1974, by the president, any vice-president, assistant vice-president, manager, comptroller, treasurer, assistant treasurer, trust officer or assistant trust officer, or chairman or vice-chairman of a corporation are hereby validated to the extent that such deeds or other conveyances were otherwise properly executed, probated, and recorded. (1991, c. 647, s. 5; 1991 (Reg. Sess., 1992), c. 1030, s. 14.)

Editor's Note. — Session Laws, 1991, c. 647, s. 7 made this section effective October 1, 1991.

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective July 24, 1992, substituted "which would" for "with would" in subsection (a).

§ 47-46.1. Notice of satisfaction of deed of trust, mortgage, or other instrument.

The form of a notice of satisfaction of a deed of trust, mortgage, or other instrument pursuant to G.S. 45-37(a)(5) shall be substantially as follows:

North Carolina, ... County.

I, ... (name of trustee or mortgagee), certify that the debt or other obligation in the amount of .... secured by the (deed of trust) (mortgage) (other instrument) executed by .... (grantor) (mortgagor), ... (trustee) (leave blank if mortgage), and .... (beneficiary) (mortgagee), and recorded in .... County at .... (book and page) was satisfied on .... (date of satisfaction).

....

(Signature of trustee or mortgagee)

I, ... (name of officer taking acknowledgment), ... (official title of person taking acknowledgment) certify that .... (name of trustee or mortgagee) personally came before me this day and acknowledged the satisfaction of the provisions of the above-referenced (deed of trust) (mortgage) (other instrument).

Witness my hand and official seal this the .... day of .... (month), ... (year).

....

(Signature of officer taking acknowledgment)

My commission expires .... (Date of expiration of official's commission).

North Carolina, ... County.

The foregoing acknowledgment of .... (name of officer that took acknowledgment), ... (official title of person that took acknowledgment), is certified to be correct.

This .... (day) of .... (month), ... (year).

....

(Signature of Register of Deeds).

(1987, c. 405, s. 2; c. 662, s. 4; 1989, c. 434, s. 2.)

Editor's Note. — Session Laws 1987, c. 405, s. 3 made this section effective 30 days after ratification. The act was ratified June 18, 1987.

Effect of Amendments. — The 1987 amendment, effective on the same date as this section became effective, substituted "acknowledgment" for "notice of satisfaction (or annexed notice of satisfaction)" near the end of the form.

The 1989 amendment, effective retroactively to July 18, 1987 and applicable to all applications for notice of satisfaction of a deed of trust, mortgage, or other instrument made on or after that date, inserted "mortgage" in the catchline and in the introductory language; and in the form for a notice of satisfaction, inserted "or mortgagee" in three places, inserted "mortgage" in two places, inserted "mortgagor," inserted "leave blank if mortgage," and inserted "mortgagee."

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-48. Clerks' and registers of deeds' certificate failing to pass on all prior certificates.

When it appears that the clerk of the superior court, register of deeds, or other officer having the power to probate or certify deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a different date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate or recordation, it shall be conclusively presumed that all the certificates of said deed or instrument necessary to the admission of same to probate or recordation have been passed upon, and the certificate of said clerk, register of deeds, or other probating or certifying officer shall be deemed sufficient and the probate, certification and recordation of said deed or instrument is hereby made and declared valid for all intents and purposes. The provisions of this section shall apply to all instruments recorded in any county of this State prior to April 1, 1980. (1917, c. 237; C.S., s. 3330; 1945, c. 808, s. 1; 1965, c. 1001; 1971, c. 11; 1973, c. 1402; 1987, c. 360, s. 2.)

Effect of Amendments. — The 1987 amendment, effective June 12, 1987, and applicable to corrections made on or after that date, substituted "April 1, 1980" for "April 1, 1974" at the end of the section.

§ 47-50. Order of registration omitted.

In all cases prior to December 31, 1992, where it appears from the records of the office of the register of deeds of any county in this State that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly signed and acknowledged as required by the laws of the State of North Carolina, and the clerk of the superior court of such county or other officer authorized to pass upon acknowledgments and to order registration of instruments has failed either to adjudge the correctness of the acknowledgment or to order the registration thereof, or both, such registrations are hereby validated and the instrument so appearing in the office of the register of deeds of such county shall be effective to the same extent as if the clerk or other authorized officer had properly adjudged the correctness of the acknowledgment and had ordered the registration of the instrument. (1911, cc. 91, 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1; C.S., s. 3332; 1941, cc. 187, 229; 1949, c. 493; 1957, c. 314; 1961, c. 79; 1981, c. 812; 1993, c. 80, s. 1.)

Editor's Note. — Session Laws 1993, c. 80, s. 2, provides that the act does not affect litigation pending on ratification (May 25, 1993).

Effect of Amendments. — The 1993 amendment, effective May 25, 1993, in the first sentence, substituted "December 31, 1992" for "December 31, 1980".

§ 47-51. Official deeds omitting seals.

All deeds executed prior to January 1, 1991, by any sheriff, commissioner, receiver, executor, executrix, administrator, administratrix, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; C.S., s. 3333; Ex. Sess. 1924, c. 64; 1941, c. 13; 1955, c. 467, ss. 1, 2; 1959, c. 408; 1971, c. 14; 1973, c. 1207, s. 1; 1983, c. 398, s. 2; 1985, c. 70, s. 2; 1987, c. 277, s. 2; 1989, c. 390, s. 2; 1991, c. 489, s. 2.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983."

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985."

The 1989 amendment, effective June 21, 1989, substituted "April 1, 1989" for "April 1, 1987."

The 1991 amendment, effective July 2, 1991, substituted "January 1, 1991" for "April 1, 1989."

§ 47-53. Probates omitting official seals, etc.

In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this State, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this State, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," or "notarial seal," or words of similar import, and no such seal appears of record or where the officer uses "notarial" in his or her certificate and signature shows that "C.S.C.," or "clerk of superior court," or similar exchange of capacity, and the word "seal" follows the signature, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January 1, 1991: Provided, this section does not apply to pending litigation. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; C.S., s. 3334; 1929, c. 8, s. 1; 1945, c. 808, s. 2; 1951, c. 1151, s. 1; 1965, c. 500; 1983, c. 398, s. 3; 1985, c. 70, s. 3; 1987, c. 277, s. 3; 1989, c. 390, s. 3; 1991, c. 489, s. 3.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983" in the last sentence.

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985" near the end of the section.

The 1989 amendment, effective June 21, 1989, substituted "April 1, 1989" for "April 1, 1987" in the last sentence.

The 1991 amendment, effective July 2, 1991, substituted "January 1, 1991" for "April 1, 1989" in the last sentence.

§ 47-53.1. Acknowledgment omitting seal of notary public.

Where any person has taken an acknowledgment as a notary public and has failed to affix his seal and such acknowledgment has been otherwise duly probated and recorded then such acknowledgment is hereby declared to be sufficient and valid: Provided this shall apply only to those deeds and other instruments acknowledged prior to January 1, 1991. (1951, c. 1151, s. 1A; 1953, c. 1307;

1963, c. 412; 1975, c. 878; 1983, c. 398, s. 4; 1985, c. 70, s. 4; 1987, c. 277, s. 4; 1989, c. 390, s. 4; 1991, c. 489, s. 4.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983" at the end of the section.

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985."

The 1989 amendment, effective June 21, 1989, substituted "April 1, 1989" for "April 1, 1987."

The 1991 amendment, effective July 2, 1991, substituted "January 1, 1991" for "April 1, 1989" at the end of this section.

§ 47-54.1. Registration by register's assistants or deputies.

All registrations of instruments heretofore made in the office of register of deeds of the several counties by the register's assistant or deputy, and signed in the name of the register of deeds by the assistant or deputy, and initialed by the assistant or deputy, instead of being signed by them as assistant or deputy, when such registrations are in all other respects regular, are hereby validated and declared to be of the same force and effect as if signed by the assistant or deputy in the respective capacity. (1991 (Reg. Sess., 1992), c. 877, s. 1.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 877, s. 2 made this section effective upon ratification. The act was ratified July 7, 1992.

§ 47-71.1. Corporate seal omitted prior to January 1, 1991.

Any corporate deed, or conveyance of land in this State, made prior to January 1, 1991, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015; 1969, c. 815; 1971, c. 61; 1973, c. 479; 1977, c. 538; 1981, c. 191, s. 1; 1983, c. 398, s. 5; 1985, c. 70, s. 5; 1987, c. 277, s. 5; 1989, c. 390, s. 5; 1991, c. 489, s. 5.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "January, 1981" in the catchline and for "May 1, 1983" near the beginning of the text of the section.

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985" in the catchline and near the beginning of the section.

The 1989 amendment, effective June 21, 1989, substituted "April 1, 1989" for "April 1, 1987" in the catchline and within the section.

The 1991 amendment, effective July 2, 1991, substituted "January 1, 1991" for "April 1, 1989" in both the catchline and the text of this section.

§ 47-100. Acknowledgments taken by officer who was grantor.

In all cases where a deed or deeds dated prior to the first day of January, 1980, purporting to convey lands, have been registered in the office of the register of deeds of the county where the lands conveyed in said deed or deeds are located, prior to said first day of January, 1980, and the acknowledgments or proof of execution of such deed or deeds has been taken as to some of the grantors by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment and proof of execution and probate of such deed or deeds thereon and the registration thereof as above described, shall be, and the same are hereby declared to be in all respects valid, and such deed or deeds shall be declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution had not been named as a grantor therein, or in anywise interested therein. (1929, c. 48, s. 1; 1953, c. 986; 1991 (Reg. Sess., 1992), c. 1030, s. 51.8.)

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective July 24, 1992, substituted "January, 1980" for "January, 1951" in two places.

§ 47-108.5. Validation of certain deeds executed in other states where seal omitted.

All deeds to lands in North Carolina, executed prior to January 1, 1991, without seal attached to the maker's name, which deeds were acknowledged in another state, the laws of which do not require a seal for the validity of a conveyance of real property located in that state, and which deeds have been duly recorded in this State, shall be as valid to all intents and purposes as if the same had been executed under seal. (1949, cc. 87, 296; 1959, c. 797; 1983, c. 398, s. 6; 1985, c. 70, s. 6; 1987, c. 277, s. 6; 1989, c. 390, s. 6; 1991, c. 489, s. 6.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983."

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985."

The 1989 amendment, effective June 21, 1989, substituted "April 1, 1989" for "April 1, 1987."

The 1991 amendment, effective July 2, 1991, substituted "January 1, 1991" for "April 1, 1989."

§ 47-108.11. Validation of recorded instruments where seals have been omitted.

In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal," "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of," and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to January 1, 1991, or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022; 1973, c. 519; c. 1207, s. 2; 1977, c. 165; 1979, 2nd Sess., c. 1185, s. 1; 1983, c. 398, s. 7; 1985, c. 70, s. 7; 1987, c. 277, s. 7; 1989, c. 390, s. 7; 1991, c. 489, s. 7.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983" in the second paragraph.

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985" in the second paragraph.

The 1989 amendment, effective June 21, 1989, substituted "April 1, 1989" for "April 1, 1987" in the last paragraph.

The 1991 amendment, effective July 2, 1991, substituted "January 1, 1991" for "April 1, 1989" near the end of this section.

§ 47-108.20. Validation of certain recorded instruments that were not acknowledged.

All instruments recorded before June 30, 1986, that were not reexecuted and reacknowledged and that correct an obvious typographical or other minor error in a recorded instrument that was previously properly executed and acknowledged are declared to be valid instruments. (1985 (Reg. Sess., 1986), c. 842, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 made this section effective upon ratification and provided that it would not affect pending litigation. The act was ratified June 30, 1986.

§ 47-108.21. Sales for 1930 on dates other than first Monday in June validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the year of 1930, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales are hereby approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1930. (1931, c. 160; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-387. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.22. Tax sales for 1931-32 on day other than law provides and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1931 and 1932, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1931 and 1932. (1933, c. 177; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-388. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.23. Tax sales for 1933-34 and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1933 and 1934, or on any date subsequent to or other than the date prescribed by law, and all certificates of sale executed and issued pursuant to and in accordance with such sales be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sales had been held and conducted on the date prescribed by law.

The board of county commissioners of any county or the governing board of any city, town, or other municipality may by resolution order the sheriff or tax collecting officer of the said county, city, town, or other municipality to advertise in the manner provided by law and sell all land for the taxes of any year levied by the said county, city, town, or other municipality, which land has not heretofore been legally sold for the failure to pay said taxes. The sale or sales herein authorized shall be held not later than the first Monday in September 1935, and certificates of sale shall be issued in accordance with and pursuant to said sale or sales in the same manner as if said sale or sales had been held and conducted as provided by law. Any sale held and conducted under the provisions of this paragraph and all certificates issued pursuant to such a sale shall be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sale had been held and conducted on the date prescribed by law.

All actions instituted in any county, city, town, or other municipality for the foreclosure of certificates of sale issued for the taxes of the years 1927, 1928, 1929, 1930, 1931 and 1932 subsequent to October 1, 1934, and all such actions instituted before October 1, 1935, shall be and the same are hereby approved, validated, and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October 1, 1934: Provided, that this section shall not be construed to repeal any private or local act passed by the General Assembly of 1935. (1935, c. 331; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-389. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.24. Notices of sale for taxes by publication validated.

All sales of real property under tax certificate foreclosures made between January 1, 1927, and March 13, 1937, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are in all respects validated as to publication of said notice: Provided said publication was completed as above set out within 10 days of the date of the sale.

The provisions of this section shall not apply to the Counties of Alleghany, Beaufort, Cabarrus, Camden, Carteret, Caswell, Currituck, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Johnston, Jones, Macon, Mitchell, Moore, Nash, New Hanover, Perquimans, Pitt, Polk, Rowan, Rutherford, Scotland, Surry, Wake, Warren, Washington, and Wayne. (1937, c. 128; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-390. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.25. Validation of sales and resales held pursuant to § 105-374.

All sales or resales held prior to April 14, 1951, pursuant to G.S. 105-374, where the advertisement was in accordance with G.S. 1-327 and 1-328 as provided by such sections prior to their repeal, are validated to the same extent as if such advertisement were in accordance with Article 29A of Chapter 1 of the General Statutes; and all such sales, where the provisions of G.S. 45-28 as to resales, as provided by such section prior to its repeal, were followed, are validated to the same extent as if the resale procedure provided for in Article 29A of Chapter 1 of the General Statutes had been followed. (1951, c. 1036, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-391. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

Sections 1-327 and 1-328, referred to in this section, were repealed by Session Laws 1949, c. 719, s. 2. Section 45-28, referred to in this section, was repealed by Session Laws 1949, c. 720, s. 5.

§ 47-108.26. Validation of reconveyances of tax foreclosed property by county boards of commissioners.

The action of county boards of commissioners taken prior to March 20, 1951, reconveying tax foreclosed property by private sale to the former owners or other interested parties for amounts not less than such counties' interest therein is hereby ratified, confirmed, and validated. (1951, c. 300, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-392. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

ARTICLE 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-112. (Effective October 1, 1994 — See editor's note) Forgery or alteration of discharge or certificate; punishment.

Any person who shall forge, or in any manner alter any discharge or certificate of lost discharge issued by the government of the United States, and offer the same for registration or secure the registration of the same under the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1921, c. 198, s. 4; C.S., s. 3366(n); 1993, c. 539, s. 409; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court".

ARTICLE 6.

Registration and Execution of Instruments Signed under a Power of Attorney.

§ 47-115.1: Repealed by Session Laws 1983, c. 626, s. 2, effective October 1, 1983.

Cross References. — As to powers of attorney, see now § 32A-1 et seq. As to effect of powers of attorney executed pursuant to § 47-115.1 prior to October 1, 1983, see § 32A-14.

Chapter 47A.

Unit Ownership.

ARTICLE 1.

Unit Ownership Act.

§ 47A-1. Short title.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

§ 47A-2. Declaration creating unit ownership; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Bogue Shores Homeowners Ass'n v. Town of Atl. Beach, 109 N.C. App. 549, 428 S.E.2d 258 (1993).

§ 47A-3. Definitions.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

§ 47A-4. Property subject to Article.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-5. Nature and incidents of unit ownership.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-8. Use of common areas and facilities.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-9. Maintenance, repair and improvements to common areas and facilities; access to units for repairs.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-10. Compliance with bylaws, regulations and covenants; damages; injunctions.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Incorporated condominium homeowners' association lacked standing to sue in its own name to enforce various restrictions on activity at the condominiums. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

To receive preliminary injunction, plaintiff must show likelihood of success on merits and some type of irreparable harm. This standard, however, does not require showing that injury is beyond repair, but that injury is one to which complainant should not be required to submit or other party permitted to inflict. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

Decision by trial court to issue or deny injunction will be upheld if there is ample competent evidence to support decision, even though evidence may be conflicting and appellate court could substitute its own findings. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

§ 47A-13. Declaration creating unit ownership; contents; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986); Bogue Shores Homeowners Ass'n v. Town of Atl. Beach, 109 N.C. App. 549, 428 S.E.2d 258 (1993).

§ 47A-15. Plans of building to be attached to declaration; recordation; certificate of architect or engineer.

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-16. Termination of unit ownership; consent of lienholders; recordation of instruments.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-18. Bylaws; annexed to declaration; amendments.

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-19. Bylaws; contents.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

The bylaws must contain any restrictions, not contained in the declaration, respecting use and maintenance to prevent unreasonable interference with the unit owners' property. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-21. Units taxed separately.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-26. Actions as to common interests; service of process on designated agent; exhaustion of remedies against association.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-28. Persons subject to Article, declaration and bylaws; effect of decisions of association of unit owners.

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

ARTICLE 2.

Renters in Conversion Buildings Protected.

§ 47A-34. Definitions.

Legal Periodicals. — For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

Chapter 47B.

Real Property Marketable Title Act.

§ 47B-1. Declaration of policy and statement of purpose.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Applied in Harris v. Walden, 70 N.C. App. 616, 320 S.E.2d 435 (1984); Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986); Younce v. United States, 661 F. Supp. 482 (W.D.N.C. 1987); Canady v. Cliff, 93 N.C. App. 50, 376 S.E.2d 505 (1989).

Cited in Harris v. Walden, 314 N.C. 284, 333 S.E.2d 254 (1985); Snover v. Grabenstein, 106 N.C. App. 453, 417 S.E.2d 284 (1992).

§ 47B-3. Exceptions.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Applied in Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986).

Chapter 47C.

North Carolina Condominium Act.

Article 2.

Creation, Alteration, and Termination of Condominiums.

Sec.
47C-2-109. Plats and plans.

ARTICLE 1.

General Provisions.

§ 47C-1-103. Definitions.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-1-104. Variation; power of attorney or proxy to declarant.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

ARTICLE 2.

Creation, Alteration, and Termination of Condominiums.

§ 47C-2-101. Execution and recordation of declaration.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-105. Contents of declaration.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-109. Plats and plans.

(a) The declarant shall file with the register of deeds in each county where the condominium is located the condominium's plat or plan prepared in accordance with this section. The plat or plan shall be considered a part of the declaration but shall be recorded separately, and the declaration shall refer by number to the file where such plat or plan is recorded. Each plat or plan shall be kept by the register of deeds in a separate file, indexed in the same manner as a conveyance entitled to be recorded, numbered serially in the order of receipt, and designated "Condominium" with the name of the building, if any, and shall contain a reference to the book and page numbers and date of the recording of the declaration. Each plat or plan must contain a certification by an architect licensed under the provisions of Chapter 83 [83A] of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes that it contains all of the information required by this section.

(b) Each plat or plan or combination thereof must show:

(1) The name and a survey or general schematic map of the entire condominium;

(2) The location and dimensions of all real estate not subject to development rights or subject only to the development right to withdraw and the location and dimensions of all existing improvements within that real estate;

(3) The location and dimensions of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;

(4) The extent of any encroachments by or upon any portion of the condominium;

(5) The location and dimensions of all easements having specific location and dimensions and serving or burdening any portion of the condominium;

(6) The verified statement of an architect licensed under the provisions of Chapter 83A of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes certifying that such plats or plans fully and accurately depict the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, as built;

(6a) The certificate by a registered land surveyor licensed under the provisions of Chapter 89C of the General Statutes stating that the plats or plans accurately depict the legal boundaries and the physical location of the units and other improvements relative to those boundaries;

(7) The locations and dimensions of limited common elements; however, parking spaces and the limited common elements described in subsections 47C-2-102(2) and (4) need not be shown, except for decks, stoops, porches, balconies, and patios;

(8) A legally sufficient description of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";

(9) The distance between noncontiguous parcels of real estate comprising the condominium;

(10) Any unit in which the declarant has reserved the right to create additional units or common elements.

(c) A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the condominium. Any contemplated improvement shown must be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT".

(d) Upon exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of subsections (a), (b), and (c) or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of those subsections.

(e) In order to be recorded, plats or plans filed shall:

(1) Be reproducible plats or plans on cloth, linen, film, or other permanent material and be submitted in that form; and

(2) Have an outside marginal size of not more than 21 inches by 30 inches nor less than eight and one-half inches by 11 inches, including one and one-half inches for binding on the left margin and a one-half inch border on each of the other sides. Where size of the buildings or suitable scale to assure legibility require, plats or plans may be placed on two or more sheets with appropriate match lines.

(f) The fee for recording each plat or plan sheet submitted shall be as prescribed by G.S. 161-10(a)(3). (1985 (Reg. Sess., 1986), c. 877, s. 1; 1987, c. 282, s. 8; 1989, c. 571.)

Effect of Amendments. — The 1989 amendment, effective October 1, 1989 and applicable to all plats and plans filed with the register of deeds on or after that date, added subdivision (b)(6a).

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-110. Exercise of development rights.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

Article 3.

Management of the Condominium.

§ 47C-3-102. Powers of unit owners' association.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-105. Termination of contracts and leases of declarant.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-107. Upkeep; damages; assessments for damages, fines.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-112. Conveyance or encumbrance of common elements.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-115. Assessments for common expense.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-117. Other liens affecting the condominium.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

ARTICLE 4.

Protection of Purchasers.

§ 47C-4-110. Escrow of deposits.

CASE NOTES

Evidence Regarding Requirement. — Deposit money given to reserve a condominium unit under this section was still rightfully owned by the purchaser were required to be placed in escrow. It follows that it was not error for the trial judge to deny defendant's motion in limine to exclude evidence indicating such a requirement. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

Testimony Regarding Absence of Criminal Sanctions. — Trial judge did not abuse his discretion by refusing to admit the testimony of detective that a violation of this section is not subject to criminal sanctions. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

§ 47C-4-114. Implied warranties of quality.

Legal Periodicals. — For comment, "From Caveat Emptor to Consumer Equity — The Implied Warranty of Quality Under the Uniform Common Interest Ownership Act," see 27 Wake Forest L. Rev. 571 (1992).

Chapter 48.

Adoptions.

Sec.
48-3. What minor children may be adopted; notice required before a child's placement; violation a misdemeanor; investigation.
48-25. Record and information not to be made public; violation a misdemeanor.
48-28. Questioning validity of adoption proceeding.
48-36. Adoption of persons who are 18 or more years of age; change of name; clerk's certificate and record; notation on birth certificate; new birth certificate.
48-37. (Effective October 1, 1994 — See editor's note) Compensation for placing or arranging placement of child for adoption prohibited.
48-38. (Effective October 1, 1994 — See editor's note) Advertisements soliciting children for adoption prohibited.

§ 48-1. Legislative intent; construction of Chapter.

CASE NOTES

Cited in In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993).

§ 48-3. What minor children may be adopted; notice required before a child's placement; violation a misdemeanor; investigation.

(a) Any minor child, irrespective of place of birth or place of residence, and whether or not a citizen of the United States, may be adopted in accordance with the provisions of this Chapter.

(b) **(Effective October 1, 1994 — See editor's note)** No less than 72 hours before any child less than 12 years old may be placed with any person in anticipation of an adoption, the director of social services of the county in which the parent or guardian resides or the county in which the child was born or will be born shall be notified in writing of the proposed placement. The written notification shall be sent by the prospective adoptive parents and shall contain:

(1) The names and addresses of each parent or guardian of the child and of each person with whom the child is to be placed for adoption,
(2) The signatures of a parent or guardian of the child and of each person with whom the child is to be placed for adoption,
(3) The birth date or expected birth date and county of birth or expected county of birth of the child, and
(4) The intention of the parties as to adoption of the child.

The notification may also contain any request for counseling that any of the parties to the placement wish to make.

The requirement of notification does not apply to placements with a child's relative listed in G.S. 48-21.

Any person who willfully and knowingly violates this subsection shall be guilty of a Class 1 misdemeanor.

(c) Promptly upon receipt of notification under subsection (b), the director shall investigate the proposed adoptive placement. The director may waive an investigation if circumstances warrant, or, in making an investigation, may rely on information already known to the department. If the director determines that the proposed placement appears to be contrary to the child's welfare, the director shall promptly notify all the parties to the proposed placement. (1949, c. 300; 1957, c. 778, s. 2; 1967, c. 880, s. 2; 1987, c. 716, s. 1; 1993, c. 539, s. 410; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in the fourth paragraph of subsection (b).

CASE NOTES

Applied in In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991).

§ 48-9. When consent may be given by persons other than parents.

CASE NOTES

Cited in In re Baby Boy Dixon, 112 N.C. App. 248, 435 S.E.2d 352 (1993); Swing v. Garrison, 112 N.C. App. 818, 436 S.E.2d 895 (1993).

§ 48-9.1. Additional effects of surrender and consent given to director of social services or to licensed child-placing agency; custody of child; disposition of certain children with special needs.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 25.46 provides: "Effective October 1, 1994, the Department of Human Resources shall provide Medicaid coverage for adoptive children with special or rehabilitative needs regardless of the adoptive family's income."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

§ 48-11. Consent not revocable.

CASE NOTES

Cited in Stancil v. Brock, 108 N.C. App. 745, 425 S.E.2d 446 (1993).

§ 48-12. Nature of proceeding; venue.

CASE NOTES

Stated in In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993).

§ 48-18. Effect of interlocutory decree.

CASE NOTES

Cited in In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993).

§ 48-20. Dismissal of proceeding.

CASE NOTES

Cited in In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991).

§ 48-25. Record and information not to be made public; violation a misdemeanor.

(a) Neither the original file of the proceeding in the office of the clerk nor the recording of the proceeding by the Department of Human Resources shall be open for general public inspection.

(b) **(Effective October 1, 1994 — See editor's note)** With the exception of the information contained in the final order, it shall be a Class 1 misdemeanor for any person having charge of the file or the record to disclose, except as provided in subsection (d) of this section, G.S. 48-26, and as may be required under the provisions of G.S. 48-27, any information concerning the contents of any papers in the proceeding.

(c) No director of social services or any employee of a social services department nor a duly licensed child-placing agency or any of its employees, officers, directors or trustees shall be required to disclose any information, written or verbal, relating to any child or to its biological, legal or adoptive parents, acquired in the contemplation of an adoption of the child, except by order of the clerk of the superior court of original jurisdiction of the adoption, approved by order of a judge of that court, upon motion and after due notice of hearing thereupon given to the director of social services or child-placing agency; provided, however, that every director of social services and child-placing agency shall make to the court all reports required under the provisions of G.S. 48-16 and 48-19.

(d) Notwithstanding any other provision of law, certain nonidentifying information, if known, shall be given by the county department of social services or licensed child-placing agency which has such information in writing on a form provided by the Department of Human Resources to the adoptive parent or parents not later than the date of finalization of the adoption proceedings. The information described in this subsection, if known, shall, upon written request of the adoptee, be made available to the adoptee upon his reaching the age of 21. This information or any part thereof may be withheld only if it is of such a nature that it would tend to identify a biological relative of the adoptee. For any adoption completed prior to July 10, 1981, the information described in this subsection, if available, shall be given in writing to the adoptive parent or parents or legal guardian of any minor adoptee or to any adoptee who has reached the age of 21 years upon written request by such person to the agency which has the information. The nonidentifying information, if known, may include only the following:

(1) Date of the birth of the adoptee and his weight at birth;
(2) Age of biological parents in years, not dates of birth, at birth of the adoptee;
(3) Heritage of biological parents which shall consist of nationality, ethnic background, and race;
(4) Education, which shall be the number of years of school completed by the biological parents at the time of birth of the adoptee;
(5) General physical appearance of the biological parents at the time of birth of the adoptee in terms of height, weight, color of hair, eyes, skin.

(e) The county department of social services or licensed child-placing agency shall give if available a complete health history of biological parents and other relatives to the adoptive parent or parents not later than the date of finalization of the adoption proceedings and to the adoptee upon his written request. The information shall be given on a standardized form provided by the Department of Human Resources and shall include any information which would have a substantial bearing on the adoptee's mental or physical health. For any adoption completed prior to July 10, 1981, the information described in this subsection, if available, shall be given in writing to the adoptive parent or parents or legal guardian of any minor adoptee or to any adoptee upon written request by such person to the agency which has the information. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1979, c. 739, ss. 1, 2; 1981, c. 924, ss. 2, 3; 1983, c. 454, s. 6; 1993, c. 539, s. 411; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (b).

§ 48-28. Questioning validity of adoption proceeding.

(a) After the final order of adoption is signed, no party to an adoption proceeding nor anyone claiming under such a party may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law. No adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect, nor may any adoption proceeding be attacked either directly or collaterally by any person other than a biological parent or guardian of the person of the child. The failure on the part of the clerk of the superior court, the county director of social services, or the executive head of a licensed child-placing agency to perform any of the duties or acts within the time required by the provisions of this Chapter shall not affect the validity of any adoption proceeding.

(b) The final order of adoption shall have the force and effect of, and shall be entitled to, all the presumptions attached to a judgment rendered by a court of general jurisdiction. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1983, c. 454, s. 6.)

CASE NOTES

Applied in In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

§ 48-36. Adoption of persons who are 18 or more years of age; change of name; clerk's certificate and record; notation on birth certificate; new birth certificate.

(a) Any person who is 18 or more years of age, or any two such persons who are lawfully married to each other, may petition the clerk of superior court that such person or persons be declared the adoptive parents of any other person who is 18 or more years of age who shall file with the clerk written consent to such adoption. The petitioners must have resided in North Carolina or on a federal territory therein for six months immediately preceding the filing of the petition. The petition and consent shall be filed with the clerk of superior court of the county in which the petitioners reside. The clerk shall not enter any order granting the petition until it has been made to appear to him that one copy each of the petition and the consent have been posted at the courthouse door continuously for 10 days immediately preceding such order. For good cause shown, the clerk may issue an order declaring the petitioners to be the adoptive parents of the person consenting to be adopted.

(b) Upon entry of the order of adoption in accordance with the provisions of subsection (a) of this section, the rights, duties, and obligations of the adoptive parents and the person adopted shall be, in relation to each other, and in relation to all other persons, the same as if the adoption had been completed under the provisions of this Chapter other than those contained in this section, and as if the adoption had taken place immediately before the person adopted became 18 years of age; provided, however, the provisions of this section shall not relieve any person of any duty to support any other person, nor shall the provisions of this section relieve any person of any criminal liability, arising under any other provision of law, for failure to provide support for any person.

(c) Except as provided in subsections (b), (d) and (e) of this section, the provisions of this Chapter which are not a part of this section shall not apply to the adoption of persons who are more than 18 years of age.

(d) Except in the case of a change of name in accordance with subsection (e) of this section, at the time of or subsequent to the entry of the order of adoption, the clerk may for proper cause shown and upon written application of the adoptive parents and the person adopted, issue an order changing the name of the person adopted from his true name to the name applied for. The order shall contain the true name, the county of birth, and the date of birth of each adoptive parent; the true name, the county of birth, and the date of birth of the person adopted; the name of each parent as shown on the birth certificate of the person adopted; and the name sought to be adopted. The clerk shall issue to the person adopted a certificate under his hand and seal of office, stating the change made in the name, and shall record the applications and order on the docket of special proceedings in his court. He shall forward a copy of the change of name order to the State Registrar of Vital Statistics if the person adopted was born in North Carolina. Upon receipt of the order, the State Registrar shall note the change of name specified in the order on the birth certificate of the person adopted, and shall notify the register of deeds of the county of birth of the person adopted.

(e) If requested in the application for the change of name filed by the adoptive parents and the person adopted the clerk may, for good cause shown, before or after the entry of the order of adoption, decree a change of name in accordance with and subject to all the provisions of G.S. 48-29.

(f) Within 10 days after the order of adoption is entered, the clerk must file with the Department of Human Resources a copy of the petition giving the date of the filing of the original petition, the consent of the person sought to be adopted, and the order of adoption, and the Department of Human Resources must cause all papers pertaining to the proceeding to be permanently registered and filed. (1967, c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 1231, s. 1; 1973, c. 849, s. 3; 1975, c. 91; 1981, c. 657; 1989, c. 208; c. 727, s. 219(4); 1993, c. 553, s. 14.)

Effect of Amendments. — The 1993 amendment, effective July 24, 1993, in subsection (f) substituted "Department of Human Resources" for "Department of Environment, Health, and Natural Resources".

§ 48-37. (Effective October 1, 1994 — See editor's note) Compensation for placing or arranging placement of child for adoption prohibited.

No person, agency, association, corporation, institution, society or other organization, except a licensed child-placing agency as defined by G.S. 48-2(4), or a county department of social services, shall offer or give, charge or accept any fee, compensation, consideration or thing of value for receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption. Provided, that the adoptive parents may pay the reasonable and actual medical expenses incurred by the biological mother incident to the birth of the child, and provided that in the petition for adoption the adoptive parents must disclose the amount of these payments and must represent that there were no gifts or payments of, or promises to give or pay, any other fee, compensation, consideration, or thing of value such as is prohibited by this section. The act of preparing and filing the adoption proceeding before the court shall not be construed as receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption. Any person who violates any provision of this section shall be guilty of a Class 1 misdemeanor. Any person who is convicted of or pleads guilty to a second or subsequent violation of this section shall be guilty of a Class H felony which may include a fine not more than ten thousand dollars ($10,000). (1975, c. 335, s. 1; 1991, c. 335, s. 1; 1993, c. 539, ss. 412, 1264; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. —

Session Laws 1993, c. 539, s. 412, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and, upon conviction or plea of guilty shall be fined or imprisoned or both at the discretion of the court" in the second to last sentence.

Session Laws 1993, c. 539, s. 1264, effective October 1, 1994, and applicable to offenses occurring on or after that date, in the last sentence substituted "Class H felony which may include a fine" for "felony and shall be imprisoned for not more than three years or fined" and deleted from the end "or both at the discretion of the court".

CASE NOTES

Violation of Section. — Actions of adopting parents and their attorney in making funds available for the purpose of bringing a biological mother into the State so as to facilitate the adoption of her unborn child, including supporting her and the child through the date of birth and returning the mother to her home state, constituted a violation of this section. In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991).

§ 48-38. (Effective October 1, 1994 — See editor's note) Advertisements soliciting children for adoption prohibited.

No person, agency, association, corporation, society or other organization, except a licensed child-placing agency as defined in G.S. 48-2, a county department of social services, or the Department of Human Resources, shall publish, transmit, broadcast, or otherwise distribute any advertisement of any type whatsoever which solicits the receiving or placing of children for adoption, or which solicits the custody of children. Any person who violates any provision of this section shall be guilty of a Class 1 misdemeanor. (1975, c. 335, s. 2; 1981, c. 275, s. 6; 1993, c. 539, s. 413; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and upon conviction or plea of guilty shall be fined or imprisoned or both at the discretion of the court" in the last sentence.

Chapter 48A.

Minors.

§ 48A-2. Age of minors.

CASE NOTES

Procedure for Changing Support When Child Reaches Age 18. — A husband had no authority to unilaterally attempt his own modification of child support payments upon one of his children reaching the age of 18, and being no longer a "minor" under this section, even though the support order directed the husband to pay support for "his two minor children...." The proper procedure for the husband to follow would have been to apply to the trial court for relief pursuant to § 50-13.7. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Stated in Pieper v. Pieper, 90 N.C. App. 405, 368 S.E.2d 422 (1988).

Cited in Williams v. Williams, 97 N.C. App. 118, 387 S.E.2d 217 (1990).

Chapter 49.

Bastardy.

Article 1.

Support of Illegitimate Children.

Sec.
49-7. Issues and orders.
49-8. Power of court to modify orders, suspend sentence, etc.

Article 2.

Legitimation of Illegitimate Children.

49-12.1. Legitimation when mother married.

Article 3.

Civil Actions Regarding Illegitimate Children.

Sec.
49-14. Civil action to establish paternity.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. Title.

Legal Periodicals. —
For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

For article, "Surrogate Parenthood: Finding a North Carolina Solution," see 18 N.C. Cent. L.J. 1 (1989).

CASE NOTES

Cited in Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

§ 49-2. (See editor's note for date change) Nonsupport of illegitimate child by parents made misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor and subject to such penalties as are hereinafter provided" in the first sentence.

CASE NOTES

I. In General.
V. Instructions, Submission to Jury, and Verdict.

I. IN GENERAL.

Effect of Prosecution upon Subsequent Civil Proceedings, etc. — General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

Applied in Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Cited in Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985).

V. INSTRUCTIONS, SUBMISSION TO JURY, AND VERDICT.

And Submission of Interrogatories or Issues, etc. — Although a general verdict of "guilty" or "guilty as charged" may be proper, it is not required. Indeed, the preferred practice in cases charging a violation of this section calls for the submission of written issues to the jury. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A jury's verdict based on issues submitted to it should include an individual determination of four issues. First, is defendant a parent of the illegitimate child in question? Second, did defendant receive notice and demand for support? Third, did defendant willfully neglect or refuse to provide adequate support for the child? Lastly, if the answers to the preceding are yes, is defendant guilty of willful neglect or refusal to maintain and provide adequate support for his illegitimate child? Such a verdict of the jury is in the nature of a special verdict and, when attempted, must reveal that all issues of ultimate material fact have been resolved against defendant. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A jury verdict must unambiguously state that defendant has been found guilty of a crime. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A general verdict of "guilty" or "guilty as charged" is sufficient when a defendant is properly charged under this section. However, when the jury undertakes to spell out its verdict without specific reference to the charge, it is essential that the spelling be correct. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

Verdict Held Insufficient. — A verdict of "guilty of non-support of illegitimate child" was held improper and was set aside where it neither alluded generally to the warrant nor used specific language sufficient to show a conviction of the offense charged. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

§ 49-4. When prosecution may be commenced.

CASE NOTES

There is no statute of limitations as such affecting a father's duty to support his illegitimate children. That duty continues throughout the child's minority. Bertie-Hertford Child Support Enforcement Agency ex rel. Souza v. Barnes, 80 N.C. App. 552, 342 S.E.2d 579 (1986).

§ 49-7. Issues and orders.

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to provide adequate support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the child, subject to the limitations of G.S. 50-13.10. The amount of child support shall be determined as provided in G.S. 50-13.4(c). The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this Article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

The court before whom the matter may be brought, on motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist or other duly qualified person. The evidentiary effect of those blood tests and comparisons and the manner in which the expenses therefor are to be taxed as costs shall be prescribed in G.S. 8-50.1. In addition, if a jury tries the issue of parentage, they shall be instructed as set out in G.S. 8-50.1. From a finding on the issue of parentage against the alleged-parent defendant, the alleged-parent defendant has the same right of appeal as though he or she had been found guilty of the crime of willful failure to support an illegitimate child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1944, c. 40; 1947, c. 1014; 1971, c. 1185, s. 19; 1975, c. 449, s. 3; 1977, c. 3, s. 2; 1979, c. 576, s. 2; 1987, c. 739, s. 1; 1989, c. 529, s. 6.)

Editor's Note. — Session Laws 1987, c. 739, s. 7 is a severability clause.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added "subject to the limitations of G.S. 50-13.10" at the end of the third sentence.

The 1989 amendment, effective October 1, 1989, and applicable to child support orders entered or modified on or after that date, substituted "the child, subject to the limitations of G.S. 50-13.10" for "the particular child who is the object of the proceedings subject to the limitations of G.S. 50-13.10" in the third sentence of the first paragraph; and substituted the present fourth sentence of the first paragraph for the former sentence which read "The court in fixing this sum shall take into account the circumstances of the case, the financial ability to pay and earning capacity of the defendant, and his or her willingness to cooperate for the welfare of the child."

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North

Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Continuing Duty to Support. — The payment of the lump sum amount ordered pursuant to this section as a result of a conviction for non-support of an illegitimate child does not relieve defendant of responsibility for future support. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

This section, read together with § 50-13.7, clearly contemplates a continuing obligation on the part of the parents of an illegitimate child to provide support, including when necessary the modification or increase of payments ordered to satisfy this obligation. Having been conclusively determined a "responsible parent," as that term is defined in § 110-129, the father of an illegitimate child must necessarily remain liable for the future support of his minor child. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

§ 49-8. Power of court to modify orders, suspend sentence, etc.

Upon the determination of the issues set out in G.S. 49-7 and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to cooperate, to make an order or orders upon the defendant and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require subject to the limitations of G.S. 50-13.10. The order or orders made in this regard may include any or all of the following alternatives:

(1) Repealed by Session Laws 1994, Extra Session, c. 14, s. 35, effective October 1, 1994.
(2) Suspend sentence and continue the case from term to term;
(3) Release the defendant from custody on probation conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child;
(4) Order the defendant to pay to the mother of the said child the necessary expenses of birth of the child and suitable medical attention for her;
(5) Require the defendant to sign a recognizance with good and sufficient security, for compliance with any order which the court may make in proceedings under this Article. (1933, c. 228, s. 7; 1939, c. 217, s. 6; 1987, c. 739, s. 2; 1994, Ex. Sess., c. 14, s. 35.)

Editor's Note. — Session Laws 1987, c. 739, s. 7 is a severability clause.

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added "subject to the limitations of G.S. 50-13.10" at the end of the first sentence.

The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "G.S. 49-7" for "in the foregoing section" in the introductory language; and deleted subdivision (1), which read "Commit the defendant to prison for a term not to exceed six months."

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.

Cross References. — As to legitimation procedure when mother is married, see § 49-12.1.

Legal Periodicals. —

For article, "The Parental Rights of Unwed Fathers: A Developmental Perspective," see 20 N.C. Cent. L.J. 45 (1992).

CASE NOTES

Section Read in Conjunction with Statutes Applicable to Special Proceedings. — This section, as a special proceeding, should provide procedural mechanisms for the full and fair resolution of cases. To ensure the parties' right to a trial by jury, this section can and should be read in conjunction with the procedural statutes that apply to all special proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Legitimation Procedure Within Jurisdiction of Superior Court Clerk. — The legitimation procedure, which is identified in this section as a special proceeding in the superior court of the county in which the putative father resides, is within the jurisdictional purview of the clerk of superior court. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

The clerks of superior court have authority, pursuant to this section, to enter an order legitimating a minor child of a man who alleges that he is the child's natural father, where the child is presumed to be legitimate because he was born to his mother while she was lawfully married to another man, provided that the issue of paternity must be submitted to and decided by a jury after the child and the husband have been properly made parties to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

There are several ways to legitimate children in North Carolina: 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, — U.S. —, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Phrase "born out of wedlock" should refer to the status of the parents of the child in relation to each other. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

A child born to a married woman, but begotten by one other than her husband, is a child "born out of wedlock." In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Subsequently Filed Affidavit Did Not Relate Back to Original Filing Date. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining putative father's address, was filed with adoption petition in lieu of affidavit required by § 48-13, a subsequently filed affidavit did not relate back to original filing date of petition so as to cut off rights of putative father who filed legitimation petition to this section before affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

Child Is Necessary Party. — Under this section, the child is a necessary party to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Married Woman's Husband Should Be Summoned. — As a potentially adverse party in a special proceeding under this section brought by natural father of child whose mother was married to another man at the time of his conception and birth, the married woman's husband should be construed as one of the respondents on whom summons must be served. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985). See also § 49-12.1.

Summons Procedure Governed by § 1-393. — The requirement that a summons be served upon the man to whom the child's mother was married when the child was conceived and born would be governed by § 1-393. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Standard of Proof. — This section, just as § 49-14, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985). But see now § 49-12.1(c).

Presumption of Legitimacy Where Child's Mother Is Married. — Because of the strong presumption of legitimacy involved where mother of child is married, the lawful husband of the mother has an obvious interest in a legitimation proceeding involving a child born to his wife while the two were married. The rebuttal of this presumption should be presented to and resolved by a jury to ensure that the parties' rights are adequately protected. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Man Living with Mother for Five Years Preceding Child's Birth Was Putative Father. — Petitioner, who had lived openly and notoriously in an adulterous relationship with the mother of child (born in 1965) since 1960, continuing to maintain and care for the child born of that relationship, was the "putative father" of the child, rather than the mother's husband, who discontinued living with the mother in 1960, years before the child was born. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under § 49-14 before proceeding under this section to have child legitimated. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

§ 49-12. Legitimation by subsequent marriage.

CASE NOTES

Action under § 49-14 Prohibited When Child Is Legitimated. — If child is legitimated by virtue of this section, an action under § 49-14 cannot be maintained, as § 49-14 establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

DNA sampling results may be used to rebut the presumption that a child born to a married woman is her husband's child and to simultaneously offer evidence that a person was "born out of wedlock" within the meaning of this section. Batcheldor v. Boyd, 108 N.C. App. 275, 423 S.E.2d 810 (1992), cert. denied, 333 N.C. 254, 426 S.E.2d 700 (1993).

Applied in DOT v. Fuller, 76 N.C. App. 138, 332 S.E.2d 87 (1985).

§ 49-12.1. Legitimation when mother married.

(a) The putative father of a child born to a mother who is married to another man may file a special proceeding to legitimate the child. The procedures shall be the same as those specified by G.S. 49-10, except that the spouse of the mother of the child shall be a necessary party to the proceeding and shall be properly served. A guardian ad litem shall be appointed to represent the child if the child is a minor.

(b) The presumption of legitimacy can be overcome by clear and convincing evidence.

(c) The parties may waive a jury trial and enter a consent order with the approval of the clerk of superior court. The order entered by the clerk shall find the facts and declare the proper person the father of the child and may change the surname of the child.

(d) The effect of legitimation under this section shall be the same as provided by G.S. 49-11.

(e) A certified copy of the order of legitimation under this section shall be sent by the clerk of superior court under his official seal to the State Registrar of Vital Statistics who shall make a new birth certificate bearing the full name of the father of the child and, if ordered by the clerk, changing the surname of the child. (1991, c. 667, s. 2; 1991 (Reg. Sess., 1992), c. 1030, s. 15.)

Editor's Note. — Session Laws 1991, c. 667, s. 3 made this section effective October 1, 1991.

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective July 24, 1992, substituted "shall be the same" for "shall be same" in subsection (d).

§ 49-13. New birth certificate on legitimation.

Cross References. — As to new birth certificate, see also § 49-12.1.

CASE NOTES

Cited in Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

ARTICLE 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

(a) The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A certified copy of a certificate of birth of the child shall be attached to the complaint. Such establishment of paternity shall not have the effect of legitimation.

(b) Proof of paternity pursuant to this section shall be by clear, cogent, and convincing evidence.

(c) No such action shall be commenced nor judgment entered after the death of the putative father.

(d) If the action to establish paternity is brought more than three years after birth of a child, paternity shall not be established in a contested case without evidence from a blood or genetic marker test.

(e) Either party to an action to establish paternity may request that the case be tried at the first session of the court after the case is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it. (1967, c. 993, s. 1; 1973, c. 1062, s. 3; 1977, c. 83, s. 2; 1981, c. 599, s. 14; 1985, c. 208, ss. 1, 2; 1993, c. 333, s. 3.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, added "at any time prior to such child's eighteenth birthday" at the end of the first sentence of subsection (a) and added subsection (d).

The 1993 amendment, effective October 1, 1993, and applicable to civil paternity actions filed on or after that date, in subsection (b), substituted "by clear, cogent, and convincing evidence" for "beyond a reasonable doubt"; in subsection (d), substituted "a genetic marker test" for "grouping test, or evidence that the putative father has declined an opportunity for such testing"; and added subsection (e).

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Editor's Note. — *The cases annotated below were decided prior to the 1993 amendment to § 49-14, which, inter alia, changed the evidentiary standard from beyond a reasonable doubt to clear, cogent and convincing evidence.*

Purpose. —

The purpose of an action under this section is to establish the identity of the biological father of an illegitimate child so that the child's right to support may be enforced and the child will not become a public charge. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

The legislative purpose underlying this section's paternity actions is to provide the basis or means of establishing the identity of the putative father in order to allow the courts to impose an obligation of support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

There are several ways to legitimate children in North Carolina: 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, — U.S. —, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Applicability of § 50-13.6. — Section 50-13.6 does not apply to civil actions to establish paternity under this section, but would authorize an award of reasonable attorney fees for custody and support actions involving an illegitimate child whose paternity had been determined. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Action under This Section Prohibited When Child Is Legitimated. — If child is legitimated by virtue of § 49-12, an action under this section cannot be maintained, as this section establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

Only Parent Who Has Custody of Child May Bring Action for Support. — Although plaintiff alleged that he was the father of the child, he did not allege that he had custody, therefore under the provisions of § 50-13.4, only a parent who has custody of a minor child may bring an action for its support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

Effect of Criminal Proceedings, etc. —

General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

No Certified Copies of Birth Certificates Attached to Petition. — In action under Uniform Reciprocal Enforcement of Support Act, where the record disclosed that no certified copies of the birth certificates of the alleged children-obligees were attached to plaintiffs' petition, court was without subject matter jurisdiction to adjudicate defendant's paternity. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Claim of Being Tricked into Fathering Child Not Appropriate as Defense. — Argument of defendant in paternity proceeding in which he counterclaimed against plaintiff for fraud that he was tricked into fathering a child and should not bear the financial responsibility for it was not appropriate in a civil action to establish paternity, either as a defense or a counterclaim. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Standard of Proof. — Section 49-10, just as this section, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear ex rel. Jones, 314 N.C. 412, 334 S.E.2d 46 (1985).

In a paternity action under this section, plaintiff must prove beyond a reasonable doubt that defendant is the father of the child whose paternity is in issue. Thus, in a paternity case, in order to affirm a JNOV, the court must conclude as a matter of law that the jury could have had no reasonable doubt that defendant was the biological father of plaintiff's son. Smith v. Price, 74 N.C. 413, 340 S.E.2d 408 (1986).

Testimony by Expert Concerning Paternity. — Although it may be proper for a qualified physician to testify concerning the result of a defendant's blood test and concerning the use and application of the paternity index, it is not proper to allow the expert to state his opinion concerning paternity, as such an opinion is of no assistance to the trier of fact. The jury is equally capable of weighing the genetic factors along with the nongenetic circumstances to determine the ultimate probability of paternity. Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under this section before proceeding under § 49-10 to have child legitimated. In re Locklear ex rel. Jones, 314 N.C. 412, 334 S.E.2d 46 (1985).

DNA or Gene Testing. — Trial court erred in ordering DNA or gene testing subsequent to an adjudication of paternity. State ex rel. Hill v. Manning, 110 N.C. App. 770, 431 S.E.2d 207 (1993).

Applied in In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

Cited in Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985); State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 82 N.C. App. 419, 346 S.E.2d 270 (1986).

§ 49-15. Custody and support of illegitimate children when paternity established.

Legal Periodicals. —
For article, "Custody of the Illegitimate Child," see 18 N.C. Cent. L.J. 18 (1989).

CASE NOTES

Child's Welfare Is Primary Consideration. — Once paternity is established, the proper custody and amount of support are determined in the same manner as for a legitimate child. In making this determination, the court has considerable discretion, but the welfare of the child is the primary consideration. To determine the rights of an illegitimate child any differently would violate the illegitimate child's constitutional right to equal protection of the law. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Retroactive Child Support Awards Authorized. — Trial court was not precluded as a matter of law from awarding retroactive child support under this section. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

The doctrine of laches is not applicable to an action for retroactive child support since the public policy concerns about stale claims are already adequately served by the three-year statute of limitations set forth in § 1-52(2). Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Extent of Recovery for Past Expenditures. — Assuming adequate proof of the expenditures under § 50-13.4(c), the plaintiff-mother could recover reimbursement for her past support expenditures (1) to the extent she paid the father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before August 8, 1986, the date she filed her claim for child support. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Failure to Attach Certified Copies of Birth Certificates to Petition. — In action under Uniform Reciprocal Enforcement of Support Act, where the record disclosed that no certified copies of the birth certificates of the alleged children-obligees were attached to plaintiff's petition, court was without subject matter jurisdiction to adjudicate defendants' paternity. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Effect of Criminal Proceedings upon Proceedings to Establish Paternity. — General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

Reimbursement by State upon Receipt of Test Results. — Conclusion that defendant was not child's father and that the State was obligated to reimburse defendant for the monies it illegally garnished from his pay arose as a matter of law from paternity test results, which plaintiff and the court accepted as binding when order was entered, and stating those conclusions and ending the case properly in compliance with the law was the court's duty. State ex rel. Blossom v. Murray, 103 N.C. App. 653, 406 S.E.2d 302 (1991).

Cited in State ex rel. Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984); In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985); Smith v. Davis, 88 N.C. App. 557, 364 S.E.2d 156 (1988).

§ 49-17. Jurisdiction over nonresident or nonpresent persons.

CASE NOTES

Constitutionality. — This section satisfies the first prong of the test set out in Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977) by creating special jurisdiction under very limited circumstances; on its face, this statute is constitutionally sound and although the language in this section which refers to "minimum contacts" is misleading and confusing in the context of the Dillon requirements, the intent of the statute is not to abrogate the second prong of the Dillon test; rather, the statute simply creates special jurisdiction in certain situations. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

Due Process Requirements Satisfied. — In paternity suit, where the trial court adequately inquired into the defendant's contacts with this State and so set those findings out in its order without objection of the defendant, the hearing which was held on defendant's motion to dismiss for lack of personal jurisdiction comported with all due process requirements. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

North Carolina courts have a legitimate interest in protecting our citizens under circumstances such as those enumerated in this section. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

Chapter 49A.

Rights of Children.

ARTICLE 1.

Children Conceived by Artificial Insemination.

§ 49A-1. Status of child born as a result of artificial insemination.

Legal Periodicals. — For article, "Surrogate Parenthood: Finding a North Carolina Solution," see 18 N.C. Cent. L.J. 1 (1989).

Chapter 50.

Divorce and Alimony.

Article 1.

Divorce, Alimony, and Child Support, Generally.

Sec.
50-10. Material facts found by judge or jury in divorce or annulment proceedings; when notice of trial not required; procedure same as ordinary civil actions.
50-11. Effects of absolute divorce.
50-12. Resumption of maiden or premarriage surname.
50-13.1. Action or proceeding for custody of minor child.
50-13.4. Action for support of minor child.
50-13.5. Procedure in actions for custody or support of minor children.
50-13.8. Custody of persons incapable of self-support upon reaching majority.
50-13.9. Procedure to insure payment of child support.
50-13.11. Orders and agreements regarding medical support for minor children.
50-16.8. Procedure in actions for alimony and alimony pendente lite.
50-19. Maintenance of certain actions as independent actions permissible.
50-20. Distribution by court of marital property upon divorce.
50-21. Procedures in actions for equitable distribution of property.
50-22. Action on behalf of an incompetent.
50-23 through 50-29. [Reserved.]

Article 2.

Expedited Process for Child Support Cases.

50-30. Findings; policy; and purpose.
50-33. Waiver of expedited process requirement.
50-34. Establishment of an expedited process.
50-36. Child support procedures in districts with expedited process.

ARTICLE 1.

Divorce, Alimony, and Child Support, Generally.

§ 50-3. Venue; removal of action.

Legal Periodicals. — For comment, "Conflicts of Law in Divorce Litigation: A Looking-Glass World?", see 10 Campbell L. Rev. 145 (1987).

§ 50-4. What marriages may be declared void on application of either party.

CASE NOTES

Cited in Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

§ 50-5.1. Grounds for absolute divorce in cases of incurable insanity.

CASE NOTES

Expert Testimony Insufficient. — Defendant's expert testimony did not satisfy the requirements of this section where only one of defendant's medical experts associated with a four-year North Carolina medical school made any determination of defendant's condition three years prior to the institution of the action for divorce. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Sufficient Evidence. — In action for divorce based on one year's separation, where defendant wife asserted incurable mental illness as a defense, although plaintiff offered no expert evidence concerning the diagnosis of defendant's condition, plaintiff's own testimony showed defendant's ability to perform usual daily tasks when her illness was controlled with medication; moreover, the testimony of defendant's treating psychiatrist and the person most familiar with her condition over an extended period of time corroborated certain of plaintiff's evidence. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Extent of Impairment. — To bar an action for divorce based on one year's separation, the mental impairment must be to such extent that defendant does not understand what he or she is engaged in doing and the nature and consequences of the act. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Burden of Persuasion. — To bar an action for divorce based on one year's separation, the defendant bears the burden of persuasion that he or she is incurably insane within the meaning and purpose of this section. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Stated in Melton ex rel. Madry v. Madry, 106 N.C. App. 83, 415 S.E.2d 72 (1992).

§ 50-6. Divorce after separation of one year on application of either party.

Legal Periodicals. —

For note on post-separation sexual intercourse precluding enforcement of agreement requiring parties to live separate and apart, see 11 Campbell L. Rev. 73 (1988).

CASE NOTES

I. In General.
II. Separation.

I. IN GENERAL.

But, the cessation of sexual relations alone does not constitute separation. Lin v. Lin, 108 N.C. App. 772, 425 S.E.2d 9 (1993).

Evidence of Mental Impairment. — In action for divorce based on one year's separation where defendant wife asserted incurable mental illness as a defense, although plaintiff offered no expert evidence concerning the diagnosis of defendant's condition, plaintiff's own testimony showed defendant's ability to perform usual daily tasks when her illness was controlled with medication; moreover, the testimony of defendant's treating psychiatrist and the person most familiar with her condition over an extended period of time, corroborated certain of plaintiff's evidence. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Mental Impairment. — To bar an action for divorce based on one year's separation, the mental impairment must be to such extent that defendant does not understand what he or she is engaged in doing and the nature and consequences of the act. Scott v. Scott, 336 N.C. 284, 442 S.E.2d 493 (1994).

Trial court properly excluded evidence of defendant's health and her prospects for obtaining medical insurance following divorce. Such evidence is not relevant to the trial court's determination to grant or deny a divorce pursuant to this section.

Cited in Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110 (1987).

II. SEPARATION.

Evidence of Conjugal Relations Within Statutory Period Before Action. — Sexual relations between spouses separated for less than one year invalidates those obligations of the parties, pursuant to a separation agreement, that are contingent upon the requirement that the parties "live continuously separate and apart" for one year. Higgins v. Higgins, 86 N.C. App. 513, 358 S.E.2d 553 (1987), aff'd, 321 N.C. 482, 364 S.E.2d 426 (1988).

§ 50-7. Grounds for divorce from bed and board.

Legal Periodicals. —

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

CASE NOTES

I. In General.
II. Abandonment.

I. IN GENERAL.

Cited in State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988); Morrow v. Morrow, 94 N.C. App. 187, 379 S.E.2d 705 (1989); Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989).

II. ABANDONMENT.

Acts Held to Constitute Abandonment. —

Plaintiff simply moved out of his adjacent apartment and stopped supporting his wife at the same time defendant's earnings ceased and she was entering hospital to undergo surgery; the parties lived together as husband and wife "in the usually accepted sense" until that time at which time plaintiff abandoned defendant. Lin v. Lin, 108 N.C. App. 772, 425 S.E.2d 9 (1993).

Finding of Constructive Abandonment Upheld. — Where the record portrayed defendant as a busy professional who became so completely immersed in his work that, by his conduct, he effectively abandoned his wife and children; additionally, the findings of fact pointed to a pattern of behavior by defendant over a 20-year period where plaintiff was left to her own devices without defendant's assistance in maintaining a family and rearing their children, and, although the court noted that at least 10 years earlier plaintiff wife had told defendant that she needed more of his time and attention and the situation improved somewhat thereafter, it improved only for a short time, these findings supported the court's conclusion that the husband had constructively abandoned his wife. Ellinwood v. Ellinwood, 94 N.C. App. 682, 381 S.E.2d 162 (1989).

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

Legal Periodicals. —

For comment, "Conflicts of Law in Divorce Litigation: A Looking-Glass World?", see 10 Campbell L. Rev. 145 (1987).

CASE NOTES

I. In General.
II. Complaint.

I. IN GENERAL.

Cited in In re Triscari Children, 109 N.C. App. 285, 426 S.E.2d 435 (1993); Gaskill v. State ex rel. Cobey, 109 N.C. App. 656, 428 S.E.2d 474 (1993).

II. COMPLAINT.

Section Requires Complaint to Set Forth, etc. —

Allegations of the names and ages of any children of a party seeking divorce in North Carolina are required by this section, in order that the court may protect the interests of such children if the parties have failed to do so. Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

OPINIONS OF ATTORNEY GENERAL

Not Advisable for Attorney to Act as Notary and Verify Client's Divorce Complaint. — It is not advisable for a notary who is also a partner in a law firm acting of counsel to an attorney filing a divorce complaint to notarize the verification of the client. A divorce complaint which is not properly notarized is subject to dismissal. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, 58 N.C.A.G. 35 (1988).

When one partner of Firm A appears as attorney for a plaintiff in a divorce proceeding, the other partners in the firm also appear, and they could be prohibited under former § 47-8 from notarizing the verification of the client. This would be true whether or not the firm appears as "of counsel" to the individual partner on the face of the complaint or answer. Therefore, such practice should be avoided, and as an attorney/notary who acts in this fashion proceeds at his own risk. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, 58 N.C.A.G. 35 (1988).

§ 50-10. Material facts found by judge or jury in divorce or annulment proceedings; when notice of trial not required; procedure same as ordinary civil actions.

(a) The material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury.

(b) Nothing herein shall require notice of trial to be given to a defendant who has not made an appearance in the action.

(c) The determination of whether there is to be a jury trial or a trial before the judge without a jury shall be made in accordance with G.S. 1A-1, Rules 38 and 39.

(d) The provisions of G.S. 1A-1, Rule 56, shall be applicable to actions for absolute divorce pursuant to G.S. 50-6, for the purpose of determining whether any genuine issue of material fact remains for trial by jury, but in the event the court determines that no genuine issue of material fact remains for trial by jury, the court must find the facts as provided herein. The court may enter a judgment of absolute divorce pursuant to the procedures set forth in G.S. 1A-1, Rule 56, finding all requisite facts from nontestimonial evidence presented by affidavit, verified motion or other verified pleading. (1868-9, c. 93, s. 47; Code, s. 1288; Rev., s. 1564; C.S., s. 1662; 1963, c. 540, ss. 1, 2; 1965, c. 105; c. 636, s. 4; 1971, c. 17; 1973, cc. 2, 460; 1981, c. 12; 1983 (Reg. Sess., 1984), c. 1037, s. 4; 1985, c. 140; 1991, c. 568, s. 1.)

Editor's Note. — Session Laws 1991, c. 568, s. 2 provides that any judgment of absolute divorce entered prior to October 1, 1991, on the basis of nontestimonial evidence pursuant to G.S. 1A-1, Rule 56, which is proper in all other respects, is valid and of full force and effect.

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, designated the first four sentences as subsections (a) through (d), and added the second sentence of subsection (d).

CASE NOTES

Quoted in Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994).

§ 50-11. Effects of absolute divorce.

(a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out, and either party may marry again without restriction arising from the dissolved marriage.

(b) No judgment of divorce shall render illegitimate any child in esse, or begotten of the body of the wife during coverture.

(c) A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or alimony pendente lite pending at the time the judgment for divorce is granted. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or alimony pendente lite or affect any other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the judgment of absolute divorce.

(d) A divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the laws of this State.

(e) An absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case if service of process upon the defendant was by publication pursuant to G.S. 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.

(f) An absolute divorce by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to an equitable distribution of marital property under G.S. 50-20 if an action or motion in the cause is filed within six months after the judgment of divorce is entered. The validity of such divorce may be attacked in the action for equitable distribution. (1871-2, c. 193, s. 43; Code, s.

1295; Rev., s. 1569; 1919, c. 204; C.S., s. 1663; 1953, c. 1313; 1955, c. 872, s. 1; 1967, c. 1152, s. 3; 1981, c. 190; c. 815, s. 2; 1987, c. 844, s. 3; 1991, c. 569, s. 2.)

Effect of Amendments. —

The 1991 amendment, effective October 1, 1991, rewrote subsection (c).

CASE NOTES

Jurisdiction. — Where the parties invoked the jurisdiction of the district court to equitably distribute their marital property in the action for absolute divorce and equitable distribution of their marital property, the district court did not lose jurisdiction to equitably distribute the marital property because of its failure to enter a judgment in the equitable distribution case before the special proceeding seeking partition of the marital property was filed in the office of the clerk of superior court. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Subsection (e) and § 50-19(c) preserve only the claims for equitable distribution and alimony which were actually pending when the judgment of divorce was entered. Stegall v. Stegall, 110 N.C. App. 655, 430 S.E.2d 460, cert. granted, 334 N.C. 434, 433 S.E.2d 170 (1993).

Subsection (e) merely requires an equitable distribution claim to be asserted at any time prior to judgment, and does not prohibit a claim asserted before a divorce action is filed. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Equitable Distribution After Judgment of Absolute Divorce. — Under this section, a judgment of absolute divorce destroys the right to equitable distribution unless the right is asserted prior to judgment of absolute divorce. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

If a person entitled to equitable distribution does not specifically apply for it by cross-action or by a separate action prior to the judgment of absolute divorce, the divorce judgment destroys that person's statutory right to equitable distribution. Lutz v. Lutz, 101 N.C. App. 298, 399 S.E.2d 385, cert. denied, 328 N.C. 732, 404 S.E.2d 871 (1991).

Trial court erred in granting defendant wife's motion to be "relieved of the effect" of a divorce judgment solely to the extent that the judgment barred her claim for equitable distribution. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Authority for Equitable Distribution. — Where neither party made application or stated a claim for equitable distribution prior to the judgment of absolute divorce, the trial court lacked the authority to enter such a judgment. Stirewalt v. Stirewalt, 114 N.C. App. 107, 440 S.E.2d 854 (1994).

The superior court had no authority to partition marital property pursuant to the provisions of § 46-1 et seq. where, as here, the jurisdiction of the district court has been properly invoked to equitably distribute such marital property. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Effect on Debts. — Debt incurred after separation of the parties was not subject to equitable distribution. Harrington v. Harrington, 110 N.C. App. 782, 431 S.E.2d 240 (1993).

Effect of Voluntary Dismissal. — Plaintiff's claims for alimony and equitable distribution were barred by subsection (a) when plaintiff took a voluntary dismissal of those claims after judgment of divorce had been entered, but thereafter filed a second action for alimony and equitable distribution. Stegall v. Stegall, 110 N.C. App. 655, 430 S.E.2d 460, cert. granted, 334 N.C. 434, 433 S.E.2d 170 (1993).

South Carolina Divorce Action Did Not Destroy Right to Equitable Distribution under This Section. — Where neither party to a divorce action in South Carolina requested an adjudication of their property rights it necessarily followed that under the South Carolina statute the court never acquired jurisdiction over their marital property and that the divorce judgment entered therein did not destroy plaintiff's right to an equitable distribution of their marital property under this section. Cooper v. Cooper, 90 N.C. App. 665, 369 S.E.2d 630 (1988).

Asserting Claim to Property Was

Not Notice of Equitable Distribution. — In divorce case, defendant's answer asserting a claim to an interest in a specific piece of property, or to proceeds in plaintiff's possession flowing from defendant's interest in that piece of property, was not sufficient to put plaintiff on notice that he was asserting a claim for equitable distribution under § 50-20. Goodwin v. Zeydel, 96 N.C. App. 670, 387 S.E.2d 57 (1990).

Trial court had no authority to reaffirm divorce decree and reserve for future resolution the issue of equitable distribution where the trial court did not set aside the divorce but rather attempted to nullify the consequences of defendant's failure to assert her claim for equitable distribution prior to the entry of judgment of divorce. Even if the court had effectively set aside, briefly, the divorce decree itself and then immediately reinstated the divorce decree with a reservation of an equitable distribution claim, the reservation of the equitable distribution claim would have been a legal nullity because plaintiff voluntarily dismissed his equitable distribution claim and defendant did not, during the time the divorce was arguably set aside, file an answer, counterclaim, or separate action requesting equitable distribution. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Waiver of Equitable Distribution Induced by Misrepresentations of Other Party. — Defendant would be estopped from asserting the defense that plaintiff did not preserve her equitable distribution claim if plaintiff, in good faith, relied on the misrepresentations of the defendant in waiving her right to equitable distribution. Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990), discretionary review denied, 328 N.C. 330, 402 S.E.2d 833 (1991).

Divorce Decree Containing Provision Reserving Equitable Distribution Issue. — Where decree for absolute divorce contained a provision reserving the issue of equitable distribution for hearing at a later date, trial judge, with whom plaintiff thereafter filed a motion to dismiss defendant's claim for equitable distribution pursuant to subsection (e) of this section, had no authority to find error and reverse or vacate divorce judge's order reserving the issue. Stone v. Stone, 96 N.C. App. 633, 386 S.E.2d 602 (1989), cert. denied, 326 N.C. 805, 393 S.E.2d 906 (1990).

Claim for Equitable Distribution Properly Dismissed. — Trial court did not err in dismissing the wife's tardy claim for equitable distribution, either on the ground that the trial court had left the issue open or upon the ground that the husband was equitably estopped from relying on subsection (e) of this section, where, although the trial court specifically reserved the issue of equitable distribution for the future in its judgment of absolute divorce, the wife had not, and the husband had asserted a claim for equitable distribution for the future prior to the judgment of absolute divorce. Lutz v. Lutz, 101 N.C. App. 298, 399 S.E.2d 385, cert. denied, 328 N.C. 732, 404 S.E.2d 871 (1991).

Applied in Lockamy v. Lockamy, 111 N.C. App. 260, 432 S.E.2d 176 (1993); Gilbert v. Gilbert, 111 N.C. App. 233, 431 S.E.2d 805 (1993).

Quoted in Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110 (1987).

§ 50-12. Resumption of maiden or premarriage surname.

(a) Any woman whose marriage is dissolved by a decree of absolute divorce may, upon application to the clerk of court of the county in which she resides setting forth her intention to do so, change her name to any of the following:

(1) Her maiden name; or
(2) The surname of a prior deceased husband; or
(3) The surname of a prior living husband if she has children who have that husband's surname.

(a1) A man whose marriage is dissolved by decree of absolute divorce may, upon application to the clerk of court of the county in which he resides setting forth his intention to do so, change the surname he took upon marriage to his premarriage surname.

(b) The application shall be addressed to the clerk of the court of the county in which such divorced person resides, and shall set forth the full name of the former spouse of the applicant, the name of the county and state in which the divorce was granted, and the term or session of court at which such divorce was granted, and shall be signed by the woman in her full maiden name, or by the man in his full premarriage surname. The clerks of court of the several counties of the State shall record and index such applications in such manner as shall be required by the Administrative Office of the Courts.

(c) If an applicant, since the divorce, has adopted one of the surnames listed in subsection (a) or (a1) of this section, the applicant's use and adoption of that name is validated.

(d) In the complaint, or counterclaim for divorce filed by any person in this State, the person may petition the court to adopt any surname as provided by this section, and the court is authorized to incorporate in the divorce decree an order authorizing the person to adopt that surname. (1937, c. 53; 1941, c. 9; 1951, c. 780; 1957, c. 394; 1971, c. 1185, s. 23; 1981, c. 494, ss. 1-4; 1985, c. 488; 1993 (Reg. Sess., 1994), c. 565, s. 1.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, in the section catchline substituted "maiden or premarriage surname" for "maiden name or adoption of name of prior deceased or prior divorced husband"; added subsection (a1); in subsection (b), in the first sentence substituted "person" for "woman," substituted "spouse" for "husband," substituted "woman" for "applicant," and added at the end "or by the man in his full premarriage surname"; in subsection (c) substituted "an applicant" for "a woman," substituted "the divorce" for "her divorce," inserted "or (a1)," and substituted "the applicant's" for "her"; and in subsection (d) substituted "any person" for "any woman," substituted the first occurence of "the person" for "she" and the second occurence for "her."

§ 50-13.1. Action or proceeding for custody of minor child.

(a) Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.

(b) Whenever it appears to the court, from the pleadings or otherwise, that an action involves a contested issue as to the custody or visitation of a minor child, the matter, where there is a program established pursuant to G.S. 7A-494, shall be set for mediation of the unresolved issues as to custody and visitation before or concurrent with the setting of the matter for hearing unless the court waives mediation pursuant to subsection (c). Issues that arise in motions for contempt or for modifications as well as in other pleadings shall be set for mediation unless mediation is waived by the court. Alimony, child support, and other economic issues may not be referred for mediation pursuant to this section. The purposes of mediation under this section include the pursuit of the following goals:

(1) To reduce any acrimony that exists between the parties to a dispute involving custody or visitation of a minor child;

(2) The development of custody and visitation agreements that are in the child's best interest;

(3) To provide the parties with informed choices and, where possible, to give the parties the responsibility for making decisions about child custody and visitation;

(4) To provide a structured, confidential, nonadversarial setting that will facilitate the cooperative resolution of custody and visitation disputes and minimize the stress and anxiety to which the parties, and especially the child, are subjected; and

(5) To reduce the relitigation of custody and visitation disputes.

(c) For good cause, on the motion of either party or on the court's own motion, the court may waive the mandatory setting under Article 39A of Chapter 7A of the General Statutes of a contested custody or visitation matter for mediation. Good cause may include, but is not limited to, the following: a showing of undue hardship to a party; an agreement between the parties for voluntary mediation, subject to court approval; allegations of abuse or neglect of the minor child; allegations of alcoholism, drug abuse, or spouse abuse; or allegations of severe psychological, psychiatric, or emotional problems. A showing by either party that the party resides more than fifty miles from the court shall be considered good cause.

(d) Either party may move to have the mediation proceedings dismissed and the action heard in court due to the mediator's bias, undue familiarity with a party, or other prejudicial ground.

(e) Mediation proceeding shall be held in private and shall be confidential. Except as provided in this Article, all verbal or written communications from either or both parties to the mediator or between the parties in the presence of the mediator made in a proceeding pursuant to this section are absolutely privileged and inadmissible in court. The mediator may assess the needs and interests of the child, and may interview the child or others who are not parties to the proceedings when he or she thinks appropriate.

(f) Neither the mediator nor any party or other person involved in mediation sessions under this section shall be competent to testify to communications made during or in furtherance of such mediation sessions; provided, there is no privilege as to communications made in furtherance of a crime or fraud. Nothing in this subsection shall be construed as permitting an individual to obtain immunity from prosecution for criminal conduct or as excusing an individual from the reporting requirements of G.S. 7A-543 or G.S. 108A-102.

(g) Any agreement reached by the parties as a result of the mediation shall be reduced to writing, signed by each party, and submitted to the court as soon as practicable. Unless the court finds good reason not to, it shall incorporate the agreement in a court order and it shall become enforceable as a court order. If some or all of the issues as to custody or visitation are not resolved by mediation, the mediator shall report that fact to the court.

(h) If an agreement that results from mediation and is incorporated into a court order is referred to as a "parenting agreement" or called by some similar name, it shall nevertheless be deemed to be a custody order or child custody determination for purposes of Chapter 50A of the General Statutes, G.S. 14-320.1, G.S. 110-139.1, or other places where those terms appear. (1967, c. 1153, s. 2; 1989, c. 795, s. 15(b).)

Local Modification. — Gaston and Mecklenburg: 1987 (Reg. Sess., 1988), c. 1036, s. 2; 1989, c. 547, s. 2.

For additional local modifications to this section, see the main pamphlet.

Editor's Note. — This section was amended by Session Laws 1989, c. 795, s. 15(b), in the coded bill drafting format provided by § 120-20.1. Subsection (a) of this section has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 1989, c. 795, s. 29 contains a severability clause.

Effect of Amendments. — The 1989 amendment, effective August 12, 1989, designated the first paragraph as subsection (a); added the last sentence of subsection (a); and added subsections (b) through (h).

Legal Periodicals. —

For article, "Equating a Stepparent's Rights and Liabilities Vis-À-Vis Custody, Visitation and Support upon Dissolution of the Marriage with Those of the Natural Parent — An Equitable Solution to a Growing Dilemma?", see 17 N.C. Cent. L.J. 1 (1988).

For comment, "An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts," see 71 N.C.L. Rev. 1857 (1993).

CASE NOTES

Right to Seek Visitation. — In 1989, when the legislature changed subsection (a) of this section to include the right to bring an action for visitation, general case law which stated that parents who had lawful custody of their minor children had the prerogative of determining with whom their children would associate changed. Ray v. Ray, 103 N.C. App. 790, 407 S.E.2d 592 (1991).

Conditions on Parental Visitation. — Trial court did not err in conditioning parent's visitation of minor children on the noncustodial parent's ability to control his obsessive compulsive behavior when with the children. Surles v. Surles, 113 N.C. App. 32, 437 S.E.2d 661 (1993).

Grandparents Rights to Visitation Following Adoption and Termination. — The provisions of this section do not grant grandparents in a Chapter 7A proceeding standing to seek custody or visitation of a child who has been placed in the custody of the Department of Social Services after the child has been surrendered for adoption by one parent and the parental rights of the other parent have been terminated. Swing v. Garrison, 112 N.C. App. 818, 436 S.E.2d 895 (1993).

Portion of Order Retaining Jurisdiction Interlocutory. — Trial court's order retaining jurisdiction to determine custody is not a final determination of issue involved; rather it determines where children's custody issue will be heard, which is preliminary to a final decree. The portion of the order retaining jurisdiction is interlocutory in nature. No substantial right of the defendant is affected which cannot be protected by the timely appeal from the trial court's ultimate disposition of the entire controversy on the merits. Walleshauser v. Walleshauser, 100 N.C. App. 594, 397 S.E.2d 371 (1990).

Claim for Custody Held Not Frivolous. — Where there was no indication at trial that the grandparents in fact did not wish to obtain custody of the children or that their claim was made in bad faith, the fact that the grandparents had originally asked for visitation did not make their later claim for custody violative of § 1A-1, Rule 11. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Where grandmother was a good housekeeper and showed the ability to care for the children the trial court erred in denying and dismissing grandmother's petition for custody on the basis of its "serious concerns" about her parenting skills because of problems experienced by her daughter. Smith v. Alleghany County Dep't of Social Servs., 114 N.C. App. 727, 443 S.E.2d 101 (1994).

Cited in In re Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988); In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

Legal Periodicals. — For article, "Custody of the Illegitimate Child," see 18 N.C. Cent. L.J. 18 (1989).

For article, "The Parental Rights of Unwed Fathers: A Developmental Perspective," see 20 N.C. Cent. L.J. 45 (1992).

CASE NOTES

I. In General.
II. Welfare of Child.
III. Right of Parents to Custody.
  A. As Against Third Persons.
  B. As Between Parents.
IV. Visitation Rights.
VI. Discretion of Trial Court.
VII. Findings of Fact.

I. IN GENERAL.

Quoted in Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); Westneat v. Westneat, 113 N.C. App. 247, 437 S.E.2d 899 (1994).

Cited in Mussallam v. Mussallam, 321 N.C. 504, 364 S.E.2d 364 (1988); Ray v. Ray, 103 N.C. App. 790, 407 S.E.2d 592 (1991); In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993).

II. WELFARE OF CHILD.

Joint custody and any other custody award must include findings of fact which support such determination of child's best interests. Witherow v. Witherow, 99 N.C. App. 61, 392 S.E.2d 627 (1990).

Evidence of paternity may properly be considered in determining the best interests of the children. Surles v. Surles, 113 N.C. App. 32, 437 S.E.2d 661 (1993).

III. RIGHT OF PARENTS TO CUSTODY.

A. As Against Third Persons.

But This Presumption May Be Rebutted. — Although there is a rebuttable presumption in favor of a natural parent, it is not necessary to prove unfitness in order to overcome the presumption. Black v. Glawson, 114 N.C. App. 442, 442 S.E.2d 79 (1994).

A court must award custody based only upon the best interest and welfare of the child. A court must have discretion to determine the best interest of a child, and should not be restricted to awarding custody to a natural parent in the absence of a finding of unfitness. Black v. Glawson, 114 N.C. App. 442, 442 S.E.2d 79 (1994).

It is not necessary to prove a natural parent unfit in order to award custody to a third party. Black v. Glawson, 114 N.C. App. 442, 442 S.E.2d 79 (1994).

Award of Custody to Grandparents. — Where grandmother was a good housekeeper and showed the ability to care for the children the trial court erred in denying and dismissing grandmother's petition for custody on the basis of its "serious concerns" about her parenting skills because of problems experiences by her daughter. Smith v. Alleghany County Dep't of Social Servs., 114 N.C. App. 727, 443 S.E.2d 101 (1994).

Claim for Custody Held Not Frivolous. — Where there was no indication at trial that the grandparents in fact did not wish to obtain custody of the children or that their claim was made in bad faith, the fact that the grandparents had originally asked for visitation did not make their later claim for custody violative of § 1A-1, Rule 11. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

B. As Between Parents.

Joint Legal Custody Appropriate. — In addition to findings regarding parties' financial status and what would best serve interests of children, court had before it plaintiff's admission that she indeed thought defendant to be fit and proper person as stated in her verified reply to defendant's answer and counterclaim. Thus, joint legal custody was appropriate. Witherow v. Witherow, 99 N.C. App. 61, 392 S.E.2d 627 (1990).

Custody of Child Upheld Where Father Never Visited. — Where plaintiff mother had had de facto custody of five-year old child since his birth, and defendant, who had acknowledged paternity of the child when he was there, had not visited the child in a substantial length of time, nor had he requested visitation privileges or custody, formal award of custody to mother would be upheld. Craig v. Kelley, 89 N.C. App. 458, 366 S.E.2d 249 (1988).

IV. VISITATION RIGHTS.

The standard by which the court is guided in visitation matters is the child's best interest. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Burden of Proof. — Grandparents seeking visitation rights had the burden of proving that the award of visitation was in the best interest of the children; therefore, where trial judge reversed the burden, so that the mother had to prove that the visitation was bad for the children, the judge was in error. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Order for Professional Consultation Within Court's Discretion. — Where trial court found defendant's contact with his minor child had been minimal, although he was fit and proper to have visitation rights, consultation with plaintiff and defendant by a third-party professional could benefit the court in awarding specific visitation rights; therefore, there was no abuse of discretion in the court's ordering the consultation prior to its consideration of visitation rights. Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

Grandparents May Not Be Awarded Visitation Rights When Custody Is Not in Issue. — While subsection (b1) of this section authorizes the court to provide for the visitation rights of grandparents when the custody of minor children is being litigated, it does not authorize the court to enter such an order when the custody of the children is not in issue. Moore v. Moore, 89 N.C. App. 351, 365 S.E.2d 662 (1988).

As parents with lawful custody of their children have the prerogative of determining with whom they shall associate. Moore v. Moore, 89 N.C. App. 351, 365 S.E.2d 662 (1988).

VI. DISCRETION OF TRIAL COURT.

Discretion to Allow Grandparent's Visitation Rights. — Although the trial judge determined that the appellant-defendant would continue to have primary custody of the children, it was entirely within the trial judge's discretion to allow the grandparents' visitation rights based on the best interest of the children. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

VII. FINDINGS OF FACT.

Conclusory Statements Held Inadequate. — For a case setting forth a visitation order and holding that order to be conclusive and not supported by adequate findings of fact, see Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

§ 50-13.2A. Action for visitation of an adopted grandchild.

CASE NOTES

There is a reasonable basis for the classification elicited in this section, and therefore, the classification does not violate the equal protection guarantees of either the State or federal Constitutions. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

This section must be read in pari materia with § 50-13.7(a), which therefore requires a showing of a substantial change of circumstances. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Trial court did not err in allowing

grandparents to intervene in adoption proceeding pursuant to this section without holding a preliminary evidentiary hearing to determine whether a substantial relationship existed between the movants and grandchildren, where the trial judge addressed the issue of whether the grandparents had a right to intervene based on the pleadings before it, and without the necessity of a preliminary hearing the trial court made a preliminary determination that the grandparents had a right to intervene. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Evidence held sufficient to support the trial court's conclusion that grandparents had established a substantial relationship with their grandchildren. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

There existed substantial change of circumstances when visitation rights of grandparents arbitrarily terminated by the natural mother when the grandparents had established a continuing substantial relationship with their grandchildren since the entry of earlier custody order, and based upon that, the court found sufficient facts to justify its conclusion that it was in the best interest of the grandchildren to maintain a continuing relationship with the grandparents through the granting of visitation privileges. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Where adoption of two grandchildren by stepfather not finalized until one month after the entry of the judgment awarding grandparents visitation, whatever rights he was to gain in becoming an adoptive parent had not vested at the time of the hearing, and therefore the adjudication of the issues before the court did not require his presence in the suit. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Trial court's findings of fact held to establish fitness of the grandparents and that the welfare of the children would be subserved by granting them visitation. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Cited in Ray v. Ray, 103 N.C. App. 790, 407 S.E.2d 592 (1991).

§ 50-13.3. Enforcement of order for custody.

CASE NOTES

Review in contempt proceedings is limited to whether there is competent evidence to support findings of fact and whether findings support conclusions of law. Walleshauser v. Walleshauser, 100 N.C. App. 594, 397 S.E.2d 371 (1990).

Finding of Contempt Supported by Competent Evidence. — Where competent evidence supported trial court's findings of defendant's failure to comply with previous visitation order and of his present ability to comply with the order, these findings were conclusive on appeal and also supported conclusion of law that defendant was in contempt of visitation order. Walleshauser v. Walleshauser, 100 N.C. App. 594, 397 S.E.2d 371 (1990).

Cited in McLemore v. McLemore, 89 N.C. App. 451, 366 S.E.2d 495 (1988).

§ 50-13.4. Action for support of minor child.

(a) Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided.

(b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child, and any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support. However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing. The preceding sentence shall not be construed to prevent any court from ordering the support of a child by an agency of the State or county which agency may be responsible under law for such support.

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1). However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:

(1) If the child is otherwise emancipated, payments shall terminate at that time;

(2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

In the case of graduation, or attaining age 20, payments shall terminate without order by the court, subject to the right of the party receiving support to show, upon motion and with notice to the opposing party, that the child has not graduated or attained the age of 20.

(c1) Effective July 1, 1990, the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent as provided in Chapter 50 or elsewhere in the General Statutes and shall develop criteria for determining when, in a particular case, application of the guidelines would be unjust or inappropriate. Prior to May 1, 1990 these guidelines and criteria shall be reported to the General Assembly by the Administrative Office of the Courts by delivering copies to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The purpose of the guidelines and criteria shall be to ensure that payments ordered for the support of a minor child are in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. The guidelines shall include a procedure for setting child support, if any, in a joint or shared custody arrangement which shall reflect the other statutory requirements herein.

Periodically, but at least once every four years, the Conference of Chief District Judges shall review the guidelines to determine whether their application results in appropriate child support award amounts. The Conference may modify the guidelines accordingly. The Conference shall give the Department of Human Resources, the Administrative Office of the Courts, and the general public an opportunity to provide the Conference with information relevant to the development and review of the guidelines. Any modifications of the guidelines or criteria shall be reported to the General Assembly by the Administrative Office of the Courts before they become effective by delivering copies to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The guidelines, when adopted or modified, shall be provided to the Department of Human Resources and the Administrative Office of the Courts, which shall disseminate them to the public through local IV-D offices, clerks of court, and the media.

Until July 1, 1990, the advisory guidelines adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall operate as presumptive guidelines and the factors adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall constitute criteria for varying from the amount of support determined by the guidelines.

(d) Payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of such child.

(d1) For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) shall apply.

(e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order. In every case in which payment for the support of a minor child is ordered and alimony or alimony pendente lite is also ordered, the order shall separately state and identify each allowance.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

(1) The court may require the person ordered to make payments for the support of a minor child to secure the same

by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

(2) If the court requires the transfer of real or personal property or an interest therein as provided in subsection (e) as a part of an order for payment of support for a minor child, or for the securing thereof, the court may also enter an order which shall transfer title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(3) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for child-support payments as in other cases.

(4) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in an action for child-support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant. Additionally, in accordance with the provisions of G.S. 110-136, a continuing wage garnishment proceeding for wages due or to become due may be instituted by motion in the original child support proceeding or by independent action through the filing of a petition.

(5) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for child support as in other cases.

(6) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in action for child support as in other cases.

(7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of Article 3 of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(8) A judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(9) An order for the periodic payments of child support is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A of the General Statutes.

Notwithstanding the provisions of G.S. 1-294, an order for the payment of child support which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires.

(10) The remedies provided by Chapter 1 of the General Statutes, Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 16 of Chapter 1C of the General Statutes.

(11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available. (1967, c. 1153, s. 2; 1969, c. 895, s. 17; 1975, c. 814; 1977, c. 711, s. 26; 1979, c. 386, s. 10; 1981, c. 472; c. 613, ss. 1, 3; 1983, c. 54; c. 530, s. 1; 1985, c. 689, s. 17; 1985 (Reg. Sess., 1986), c. 1016; 1989, c. 529, ss. 1, 2; 1989 (Reg. Sess., 1990), c. 1067, s. 2; 1993, c. 335, s. 1; c. 517, s. 5.)

Cross References. — For the North Carolina Child Support Guidelines, effective August 1, 1991, see the Annotated Rules of North Carolina.

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 1067, s. 3 provided that prior to August 1, 1991, the Conference of Chief District Judges should review and make applicable revisions to the presumptive child support guidelines which became effective July 1, 1990. It further provided that the purpose for this review was to ensure that payments ordered were sufficient to meet the reasonable needs of the child, having due regard for relevant factors, and that the conference should give the Department of Human Resources, the Administrative Office of the Courts, and the general public an opportunity to comment on the new guidelines and any proposed changes, and that the Conference should hold at least one public hearing regarding same, with notice to be provided at least 30 days in advance. Section 3 of c. 1067 also provided that the Administrative Office of the Courts and the Department of Human Resources should compile information and statistics regarding new guidelines and file a report with the General Assembly on or before February 1, 1991, and annually thereafter.

Effect of Amendments. — The 1989 amendment, effective October 1, 1989, and applicable to child support orders entered or modified on or after that date, added the second paragraph of subsection (c), and rewrote subsection (c1).

The 1989 (Reg. Sess., 1990) amendment, effective October 1, 1990, and applicable to court orders and written agreements entered on or after that date, rewrote the second paragraph of subsection (c).

Session Laws 1993, c. 335, s. 1, effective October 1, 1993, and applicable to support orders entered on or after that date, in subdivision (c)(2), substituted "the child" for "he", deleted "the court in its discretion may order" preceding "support payments", substituted "shall continue until the child graduates" for "may continue until he graduates", inserted "fails to make satisfactory academic progress towards graduation" and added at the end "unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation"; and added the paragraph following subdivision (c)(2).

Session Laws 1993, c. 517, s. 5, effective January 1, 1994, and applicable to all orders entered on or after that date, added subsection (d1).

Legal Periodicals. — For note on child support provisions as a limit on the doctrine of necessaries, in light of Alamance County Hosp. v. Neighbors, 315 N.C. 362, 338 S.E.2d 87 (1986), see 65 N.C.L. Rev. 1308 (1987).

For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina", see 10 Campbell L. Rev. 111 (1987).

For article, "Equating a Stepparent's Rights and Liabilities Vis-A-Vis Custody, Visitation and Support upon Dissolution of the Marriage with Those of the Natural Parent — An Equitable Solution to a Growing Dilemma?", see 17 N.C. Cent. L.J. 1 (1988).

For comment, "The Seventeen Percent Solution: Formula Guidelines for Determining Child Support Awards Arrive in North Carolina," see 18 N.C. Cent. L.J. 209 (1989).

CASE NOTES

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I. IN GENERAL.

***Editor's Note.** — The case of Gilliard v. Kirk, 633 F. Supp. 1529 (W.D. N.C. 1986), annotated in the main volume under the catchline "Deeming of Support Payments for AFDC Purposes" was reversed by 483 U.S. 587, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987).*

State Policy. — It is the policy of this State that both parents have a duty to support their minor children. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

History of Section. — For discussion of the history of this section, see Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Provisions in Chapter 110 Prevail Over This Chapter. — The legislature did not intend for this chapter to control all actions for child support. Reading this chapter together with Chapter 110, the more specific provisions of Chapter 110 dealing with the procedure for determining and enforcing support obligations of a father who voluntarily acknowledges paternity prevails over any conflicting procedure in this chapter for determining and enforcing custody and support of minor children. Wake County ex rel. Horton v. Ryles, 112 N.C. App. 754, 437 S.E.2d 404 (1993).

Support Exemption. — Section 105-149 has been repealed in apparent effort by General Assembly to bring North Carolina's personal income tax laws into conformity with the 1984 revisions of federal tax statutes. Under federal law, custodial parent, not parent paying primary support, is entitled to claim support exemption for child under circumstances such as are present here. However, federal law also provides that custodial parent may waive right to claim exemption. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Trial court may order custodial parent to waive right to claim federal and state tax exemptions. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Court order assigning federal and state tax dependency exemptions to payor of child support for all income tax purposes was valid. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

The Child Support Guidelines should not be used to determine the support obligation of a stepparent, secondarily liable for a child's needs. Duffey v. Duffey, 113 N.C. App. 382, 438 S.E.2d 445 (1994).

Applied in Koufman v. Koufman, 97 N.C. App. 227, 388 S.E.2d 207 (1990); Hall v. Hall, 107 N.C. App. 298, 419 S.E.2d 371 (1992); Rose v. Rose, 108 N.C. App. 90, 422 S.E.2d 446 (1992).

Cited in Smith v. Davis, 88 N.C. App. 557, 364 S.E.2d 156 (1988); Williams v. Williams, 97 N.C. App. 118, 387 S.E.2d 217 (1990); In re Roberson, 97 N.C. App. 277, 387 S.E.2d 668 (1990); McBride v. McBride, 334 N.C. 124, 431 S.E.2d 14 (1993).

II. INSTITUTION OF ACTION.

Judicial Determination of Custody. — Subsection (a) does not specify that it requires judicial determination of custody before its provisions can be utilized by person or agency bringing action for support. Thus, where mother in her proceeding for modification of support order also requested a formal adjudication of custody, which request was granted, plaintiff met the custody requirements of subsection (a). Craig v. Kelley, 89 N.C. App. 458, 366 S.E.2d 249 (1988).

Custodial Parent, etc. —

Although plaintiff alleged that he was the father of the child, he did not allege that he had custody, therefore under the provisions of this section, only a parent who has custody of a minor child may bring an action for its support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

Required Notice Deemed Waived. — Where both parties introduced evidence on the reasonable needs of the children and the relative ability of each parent to pay support for the children, the defendant's failure to give proper notice of his request that a hearing be conducted regarding these issues was waived and the trial court was required to find facts and enter conclusions on this evidence. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991); Rose v. Rose, 108 N.C. App. 90, 422 S.E.2d 446 (1992).

Notice for Hearing. — This section does not identify any time restrictions for making the request for a hearing described in subsection (c). However, to effectuate the purpose of this section, any party in a pending action requesting a variance from the guidelines must, unless the request is made in the original pleadings, give at least ten days written notice as required by § 50-13.5(d)(1). Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Discovery Held Overbroad. — For a case in which it was held that plaintiff's discovery request in a child-support case was overbroad and should have been limited by the trial court, see Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

Prayer for Increase in Support Actually Action Under this Section. — Although plaintiff's complaint prayed for an increase in child support based upon a substantial change in circumstances, plaintiff's action was in fact brought pursuant to subsection (a) of this section because the amount sought to be increased was paid pursuant to a non-judicial separation agreement; plaintiff was actually asking the Court to enter an original award of child support. Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

III. LIABILITY FOR SUPPORT.

Relative Ability to Pay May Be Considered. —

It was apparent from the record that the trial court considered both the existence and structure of appellee's trust fund and appellant's income as an ophthalmologist in making its determination that appellant should contribute one-half of child's necessary and actual expenses. It concluded that a father in an established ophthalmologic practice, and who had a 1991 income of at least $88,000 was able to contribute half of his child's support. Munn v. Munn, 112 N.C. App. 151, 435 S.E.2d 74 (1993).

Consideration of Ability to Pay — Procedure. — Defendant's contention that summary judgment was improper because he was financially unable to make the child support payments called for in the agreement would be relevant only to future payments and could be considered only after the defendant had filed a motion in the cause for the trial court to set an amount of child support which differs from that in the separation agreement. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

Stepparent in Loco Parentis. — If an individual assumes the status of in loco parentis, he is secondarily liable to the child's natural parents for the support of that child, and if the needs of the child exceed the ability of the child's natural parents to meet those needs, then and only then is the individual in loco parentis secondarily responsible for the deficiency. Duffey v. Duffey, 113 N.C. App. 382, 438 S.E.2d 445 (1994).

By signing a separation agreement in which he agreed to pay child support to plaintiff, stepparent voluntarily and in writing extended his status of in loco parentis and gave the court the authority to order that support be paid. Duffey v. Duffey, 113 N.C. App. 382, 438 S.E.2d 445 (1994).

Children with Property of Their Own. —

Although trial court found as a fact that each child had an estate in excess of $300,000.00, the separate incomes and estates of children did not diminish or relieve the obligation of the defendant father to support his children, even though former husband's income was about $37,000.00. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Education Needs of Child. — Although public funding may have been available for special education needs of child, but was not sought by custodial parent, court did not err in requiring noncustodial parent to pay costs of child's educational expenses in proportion to parent's gross income. Sikes v. Sikes, 98 N.C. App. 610, 391 S.E.2d 855 (1990), aff'd, 330 N.C. 595, 411 S.E.2d 588 (1992).

Father's Reduction in Payments as Evidence He Had Not Met Obligations. — Where judge found that mother provided no evidence that she was entitled to payment of back child support, the evidence did not support the judge's finding; there was evidence that father had not met his child support obligations where father testified that in 1985, he reduced the amount of the payments due to a decrease in salary. Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

Equitable Estoppel Did Not Bar Claim for Past Support. — Even assuming that on some set of facts equitable estoppel might properly bar a claim for child support arrears, it was inapplicable where husband, seeking to rely on equitable estoppel, could not show that, in good faith reliance on the conduct of his ex-wife, he had changed his position for the worse; the only change made in his position was the retention to his benefit of money owed for the support of his children. Griffin v. Griffin, 96 N.C. App. 324, 385 S.E.2d 526 (1989).

Support Obligation of Noncustodial Parent. — Under new child Support Guidelines an adjustment in support obligation of noncustodial parent is reduced only when each parent has child for more than 33 percent of year. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

IV. AMOUNT OF SUPPORT.

A. In General.

History and Purpose of Guidelines. — As of July 1, 1991, the State adopted guidelines based on income-sharing approach for determining child support. These guidelines were promulgated by Conference of Chief District Judges in accordance with subsection (c1) of this section. Income-sharing formulas ignore problem of attempting to determine cost of raising a child and are based instead on assumption that each parent will contribute all of his or her income to one fund. Then the formulas provide method for equitably dividing income among family members. Income-sharing formulas seeking to equalize financial burden of divorce so that all family members experience about same proportional reduction in standard of living after divorce. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Effective Date of Guidelines. — At time support order was entered in June, 1989, the Guidelines in subsection (c1) of this section were only advisory in nature. The Guidelines became presumptive as of October 1, 1989. New presumptive guidelines became effective July 1, 1990. Therefore, at the time, (June 1989) order was entered, trial judge was neither required to follow nor refer to advisory guidelines in order. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Guidelines Are Not Mandatory But Advisory. — An examination and interpretation of subsection (c1) as written clearly indicates that the guidelines prescribed by the Conference of Chief District Court Judges are not mandatory and binding but rather advisory in nature. Morris v. Morris, 92 N.C. App. 359, 374 S.E.2d 441 (1988), decided prior to later amendments to subsection (c1).

Request for Variance for Child Support Guidelines. — Section 50-13.4 does not identify any time restrictions for making the request for a hearing. However, to effectuate the purpose of that statute, any party in a pending action requesting a variance from the guidelines must, unless the request is made in the original pleadings, give at least ten days written notice as required by this section. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

In deviating from child support guidelines, the trial court was required to make findings of fact as to the criteria that justified varying from the guidelines and the basis of the amount ordered; the court committed error because its findings were insufficient to meet this requirement. Gowing v. Gowing, 111 N.C. App. 613, 432 S.E.2d 911 (1993).

Failure to follow the presumptive child-support guidelines prescribed pursuant to subsection (c1) required that a support order be reversed; the guidelines were not mentioned in the order and the order did not make reference to any of the factors used to vary a support payment from the presumptive amounts. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

In child support action, trial court must first determine primary liability for minor child's support under subsection (b). The court then determines the actual amount of support necessary to meet the minor child's reasonable needs pursuant to subsection (c). McLemore v. McLemore, 89 N.C. App. 451, 366 S.E.2d 495 (1988).

Using disposable income (net income after expenses) is a way to fairly reflect the parties relative ability to contribute proportionately to support of the child. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

"Cost Sharing" Formula Improper. — Use of any cost-sharing formula by a trial judge is now improper in North Carolina. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

"Cost-sharing" approach to child support awards embodied in the Franks formula criticized by North Carolina Court of Appeals when applied to case arising before July 1, 1990, effective date of this section. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Under this section and § 50-13.7, party's ability to pay child support is ordinarily determined by party's actual income at time the support award is made or modified. However, if there is a finding by the trial court that the party was acting in bad faith by deliberately depressing his or her income or otherwise disregarding the obligation to pay child support, then the party's capacity to earn may be the basis for the award. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Order which contained no findings of fact regarding plaintiff's earnings or employment status was not supported by sufficient findings of fact. Smith v. Smith, 103 N.C. App. 488, 405 S.E.2d 912 (1991).

But capacity to earn, etc. —

A person's capacity to earn income may be made the basis of an award if there is a finding that the party deliberately depressed his or her income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

When the trial court makes a finding that a party deliberately depressed his or her income, then the party's capacity to earn or his potential income may be used to determine the child support obligation. McDonald v. Taylor, 106 N.C. App. 18, 415 S.E.2d 81 (1992).

Must Be Sufficient Evidence of Proscribed Intent. — A trial court's conclusion underlying imposition of the earnings capacity rule must be based upon evidence that the actions which reduced the party's income were not taken in good faith. There must be sufficient evidence of the proscribed intent. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Consideration of Spouse's Capacity to Earn Held Error. — Trial court could not consider father's capacity to earn in computing his income where the evidence indicated that he lost his job due to no fault of his own, and the court's order contained no findings that he had deliberately stopped working to avoid his support obligations. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

Support Should Not Have Been Based on Earning Capacity. — Where there was no evidence that defendant was engaging in any tactics to avoid paying child support, defendant had purchased a substantial amount of farm equipment for use in his farming operation, and he had experienced a net loss from farming for the last three years but had made a profit from this business in the past, the evidence pointed to a genuine effort by defendant to engage in his chosen profession and to support his family as well; therefore, the case was remanded so the court could make a determination based upon defendant's present earnings instead of his earning capacity. Cameron v. Cameron, 94 N.C. App. 168, 380 S.E.2d 121 (1989).

Wrongful Inclusion of Future Personal Expenditures. — Where trial court includes personal expenditures not yet made by party with no concrete plans to make such an expenditure, award entered cannot possibly reflect the relative abilities of parties to pay support at that time. Witherow v.

Witherow, 99 N.C. App. 61, 392 S.E.2d 627 (1990).

Determination of trial court not necessary to make finding of bad faith in reduction of income where the party seeking support modification was the custodial parent was not supported by current case law, nor was the trial court correct in concluding that when a custodial parent sought a change of child support based upon a reduction in income, that custodial parent had to request the court to make a finding of fact as to his or her "good faith." Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

The inclusion of a gift when calculating a defendant's income for child support purposes was an error, where there was no evidence on the part of defendant's parents that such a gift would be reoccurring. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

Non-interest Bearing Demand Note Not by Itself a Gift. — The fact that no demand had been made on a non-interest bearing demand note from defendant's parents did not render it a gift, and the trial court's finding that the transaction was a gift was erroneous. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

Earnings of Child. — In a case involving child support payments, the trial court erred in refusing to admit the children's tax returns into evidence, the only information concerning the estate and earnings of the children. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

Medical insurance premiums paid by a parent on behalf of a child are actual expenditures which must be considered in computing retroactive child support. Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992).

Failure of the trial court to treat a portion of mother's premiums as an actual expenditure for the purposes of calculating retroactive support was not error, because there was no evidence in the record to support a finding on the portion of the premiums for the joint policy attributable only to coverage of the child. In the absence of such evidence, the trial court would only be speculating as to the child's share of the cost, and this it could not do. Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992).

Consideration of Health Insurance Coverage Erroneous. — According to former subdivision (c1)(6) of this section, the trial court was not allowed to vary the presumptive amount of child support based upon the "provision of health insurance coverage;" therefore, by varying the presumptive guideline amount because of the defendant's maintenance of health insurance on the plaintiff and the children, the trial court acted in violation of this section. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Reconsideration of Alimony or Child Support After Equitable Distribution. — Section 50-20 (f) obviously contemplates that child support order may precede equitable distribution order. No child support order is ever final and delaying child support order in lengthy case until after equitable distribution issue was decided would have prolonged an already long-pending case. Trial court's decision to enter child support order prior to determination of equitable distribution issue was under the statute. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Method of Payment Is Within Discretion of Court. — In utilizing the provision in subsection (e) of this section that payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein as the court may order, the trial court is vested with broad discretion, and is not limited to ordering any one of the designated methods of payment. In keeping with the court's powers, an order under this section will be upheld barring an abuse of that discretion. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

Trial court's creation of a trust consisting of certain real and personal property owned by the parties in order to secure payment of alimony and child support was a proper exercise of its discretion in applying the provisions of subsection (e) of this section and § 50-16.7(a) and (c) and would be affirmed. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

Amount Not Excessive. — Where defendant earned one hundred thirty-two dollars ($132.00) a week and had monthly expenses in the amount of fifty-two dollars ($52.00), the court's order for defendant to pay one hundred dollars

($100.00) per month in child support was not an abuse of discretion; defendant had been paying plaintiff one hundred dollars ($100.00) per week voluntarily for several months prior to the hearing, had testified that he would continue to do so, and the court had made extensive findings regarding the child's needs, the parents' estates and earnings, etc. Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

Yearly support payment of $37,871.89 held not excessive where payor earned about $200,000.00 per year and where family enjoyed very high standard of living prior to dissolution of marriage and where court found, based on payor's testimony, that payor could pay any amount court might order up to and including $71,318.04. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Improper Reduction of Child Support Payments. — Reducing child support payments by subtracting amount of money calculated to represent what custodial parent saves in expenses while the child is visiting with noncustodial parent was improper. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Consideration of Shared Custody Justified. — Fact that defendant had sole custody of one of the children and furnished the child's sole support, while defendant contributed to the support of the two children in plaintiff's custody, clearly justified the trial court's consideration of the shared custody factor; trial court was not required to make findings as to how or why this custody arrangement rendered guidelines adopted pursuant to subsection (c1) inapplicable where the guidelines provided for support payments to be based upon the noncustodial parent's gross income. Morris v. Morris, 92 N.C. App. 359, 374 S.E.2d 441 (1988).

Sufficient Findings by the Court. — In spite of trial court's failure to make finding as to husband's net income, court's findings regarding gross income of husband and wife along with wife's net income and children's expenses was sufficient to satisfy requirement under this section that court give due regard to parties' estates, earnings, conditions and standard of living in setting child support. Sikes v. Sikes, 98 N.C. App. 610, 391 S.E.2d 855 (1990), aff'd, 330 N.C. 595, 411 S.E.2d 588 (1992).

Court's findings were insufficient to support awarding no support under subsection (c) since the court failed to determine what were the reasonable needs of the minor child for health, education, and maintenance. McLemore v. McLemore, 89 N.C. App. 451, 366 S.E.2d 495 (1988).

In an action seeking an increase in child support over the amount set forth in separation agreement, order which contained no specific findings with respect to the actual past or present expenses incurred for the support of the children was insufficient to support the court's conclusion that the reasonable needs of the children amounted to $2,800.00 per month. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

Where the trial court made no findings whatsoever with respect to the parties' "estates, earnings, conditions, [and] accustomed standard of living" for the year 1984, its award of retroactive child support would be vacated since it was not based on sufficient findings pertaining to the year 1984. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Refusal to Consider Reduction in Income. — Trial court erred in concluding that reduction in income of father, the custodial parent, due to leaving employment to return to school, could not be considered on motion to increase plaintiff's child support obligations. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Findings Unsupported by Evidence. — Judge erred by ordering mother to pay four hundred eighty dollars ($480.00) per month in child support; the figures of five hundred dollars ($500.00) and four hundred eighty dollars ($480.00) were not supported by any evidence in the record on appeal and, despite the absence of mother's financial records, the judge could have determined the child's reasonable needs through evidence offered by father; however, the figures the judge arrived at were unsupported by father's testimony, and were not supported by any of the previous orders entered in the case. Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

B. Effect of Separation Agreements, Consent Judgments and Arbitration Awards.

Level of Support in Separation

Agreement Is Only One Factor in Decision. — When a trial court is called upon for the first time to determine the appropriate level of child support payments agreed upon in separation agreements, the "presumption" of reasonableness of the agreed upon level of support in such cases is one of evidence only; that is, the agreed upon level of support constitutes some evidence of the appropriate level of support, but that this evidence must be weighed and considered by the trial court together with all other relevant and competent evidence bearing upon the statutory factors set out in subsection (c) of this section; in other words, the trial court is writing upon a clean slate, and the previously agreed upon level of support is but one factor to be considered. Morris v. Morris, 92 N.C. App. 359, 374 S.E.2d 441 (1988).

Right of Party to Separation Agreement, etc. —

The existence of a valid separation agreement relating to child support or custody does not prevent one of the parties from instituting an action for a judicial determination of those same matters. Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

No Obligation to Support Child Past Majority Despite Disability. — Where mother's testimony offered at the hearing showed that son was 18 years old, had graduated from high school, had a part-time job, and was attempting to raise money to go to college, and mother further testified that son was not a normal 18 year old since he was involved in a wreck, trial court was without authority to order father to pay child support arrearages of five hundred dollars ($500.00); the evidence showed that pursuant to subdivision (c)(2) of this section, defendant was relieved of any obligation to support his son after his graduation from high school on June 5, 1988, and even if mother's evidence was sufficient to show that son was physically or mentally incapable of self-support, there was no longer a statutory obligation for parents to support their disabled adult children. State v. Benfield, 95 N.C. App. 451, 382 S.E.2d 776 (1989).

Obligation to Pay Is Independent of Compliance with Unrelated Provisions in Agreement. — The duty of a parent to pay child support as agreed to in a separation agreement will not be excused because the other parent does not comply with other provisions of the separation agreement unrelated to the financial support of the children. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

Defendant's obligation to pay child support as provided in the separation agreement is not dependent upon plaintiff's compliance with visitation, nonharassment, or noncohabitation provisions in the same agreement. To hold otherwise would punish the children for the misbehavior of a parent. Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151, cert. denied, 329 N.C. 499, 407 S.E.2d 538 (1991).

V. TERMINATION OF OBLIGATION.

A. In General.

When Legal Obligation to Support, etc. —

In accord with second paragraph in the main volume. See Pieper v. Pieper, 90 N.C. App. 405, 368 S.E.2d 422, aff'd, 323 N.C. 617, 374 S.E.2d 275 (1988).

Effect of One of Several Children Reaching Age 18. — While child support obligations ordered by a court terminate upon the child reaching age 18, unless the child is otherwise emancipated prior to reaching age 18 or the trial court in its discretion continues to enforce the payment obligation after the child reaches age 18 and while the child is in primary or secondary school, when one of two or more minor children for whom support is ordered reaches age 18, and when the support ordered to be paid is not allocated as to each individual child, the supporting parent has no authority to unilaterally modify the amount of the child support payment. The supporting parent must apply to the trial court for modification. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

Cases holding that where one of two minor children reaches the age of 18, a trial court may retroactively modify child support arrearages when equitable considerations exist which would create an injustice if modification is not allowed were decided before § 50-13.10 became effective on October 1, 1987. Under this statute, if the supporting party is not disabled or incapacitated, a past due, vested child support payment is subject to divestment only as provided by law, and if, but only if, a written motion is filed and due notice is given to all parties before the payment is due. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

VII. FINDINGS AND CONCLUSIONS.

Remand for Further Findings. — The findings of fact in a case for child support, were insufficient to determine whether the trial court gave due regard to the estates of the parties and the case must be remanded for further findings on this matter, even though there was ample evidence contained in the record about the estates of both parties. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

Findings Must Be Specific. — Without findings relating to the parties' reasonable expenses, there is no basis for a determination as to the parties' relative abilities to provide the support necessary to meet the reasonable needs of the children. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable expenses. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

And Must Cover Factors in Subsection (c). — To comply with subsection (c), the trial court is required to make findings of fact with respect to the factors listed in the statute. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

Findings Held Insufficient. — Where the trial did not make an assessment of the child's needs, and found that plaintiff's expenses exceeded her income and that her unwieldy credit card obligations were caused by defendant's failure to pay $220 in support to her in a timely manner when she had custody of both children, the findings of fact were insufficient to support the conclusion that plaintiff should not be required to support her minor children; defendant's $220 delinquency in child support payments did not mean that plaintiff's expenses were reasonable, and the trial judge made no findings upon which to conclude that defendant had the ability to support both children. Payne v. Payne, 91 N.C. App. 71, 370 S.E.2d 428 (1988).

IX. REMEDIES.

A. In General.

And Its Remedies Have Been Expanded. — The broad language of this statute suggests that the legislature intended to expand, not limit, the trial court's remedies in enforcing payment of child support. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

The enforcement provisions under subsection (f) of this section are not mutually exclusive. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

Nor Are the Payment Provisions. — The trial court has broad discretion under subsection (e) of this section in providing for payment of child support. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

Defendant did not waive his right to support by failing to schedule notice of a hearing on the issue prior to child's emancipation; trial court was incorrect in its presumption that because the issue of custody had become moot, it could not address the issue of support. Freeman v. Freeman, 103 N.C. App. 801, 407 S.E.2d 262 (1991).

D. Attachment and Garnishment.

It was not error for trial court to enter order to withhold plaintiff's wages to collect child support arrearages that had been reduced to judgment. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

E. Recovery of Past Due Payments.

The sole limitation on a party's right to reimbursement for documented past support expenditures is imposed by § 1-52(2), which limits recovery to those expenditures incurred within three years before the date the action for support is filed. Freeman v. Freeman, 103 N.C. App. 801, 407 S.E.2d 262 (1991).

Effect of Subdivision (f)(8). — The portion of subdivision (f)(8) of this section following the semicolon does not constitute an election of remedies. Nor it is true that once arrearages are reduced to judgment the party attempting to collect the judgment is limited to the execution procedures provided by § 1-302. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

F. Retroactive Support and Reimbursement.

Retroactive child support is based solely on amount actually expended for support of minor children during time period in question. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

Measure of Liability, etc. —

In accord with the main volume. See Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

Mother's Homemaking Services Considered. — In determining father's share of the reasonable actual expenditures made by mother during the period for which retroactive child support is sought, the trial court must consider her child care and homemaking services rendered during this period. Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992).

Extent of Recovery for Past Expenditures. — Assuming adequate proof of the expenditures under subsection (c) of this section, the plaintiff-mother could recover reimbursement for her past support expenditures (1) to the extent she paid the father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before August 8, 1986, the date she filed her claim for child support. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Error Where Court Used Guidelines Instead of Actual Expenditures. — Where, although the trial court made a finding on mother's actual expenditures during the period for which retroactive support was sought, the court instead based the retroactive support award on the guidelines in effect at the time the expenses were incurred by mother, this was error requiring reversal of the order of retroactive support. Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992).

Evidence Held Sufficient to Support Award. — Where trial court specifically found that prior to filing action plaintiff expended at least four hundred dollars ($400.00) per month for the support of the parties' child and that defendant had the capacity to pay one-half of this amount toward the child's support during this time, the findings were supported by the evidence and were binding on appeal; the trial court correctly awarded plaintiff reimbursement for past child support. Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

G. Contempt.

Willfulness Is Required, etc. —

In accord with the main volume. See Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Defendant's voluntary purging of assets in bankruptcy was considered a deliberate divestment of assets; therefore, failure to comply with a child support order was willful and punishable by contempt proceedings. Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

§ 50-13.5. Procedure in actions for custody or support of minor children.

(a) Procedure. — The procedure in actions for custody and support of minor children shall be as in civil actions, except as provided in this section and in G.S. 50-19. In this G.S. 50-13.5 the words "custody and support" shall be deemed to include custody or support, or both.

(b) Type of Action. — An action brought under the provisions of this section may be maintained as follows:

(1) As a civil action.

(2) Repealed by Session Laws 1979, c. 110, s. 12, effective July 1, 1979.

(3) Joined with an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(4) As a cross action in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(5) By motion in the cause in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(6) Upon the court's own motion in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody. —

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child under the provisions of G.S. 50A-3.

(3) to (6) Repealed by Session Laws 1979, c. 110, s. 12, effective July 1, 1979.

(d) Service of Process; Notice; Interlocutory Orders. —

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-4.

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

(3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.

(e) Notice to Additional Persons in Support Actions and Proceedings; Intervention. —

(1) The parents of the minor child whose addresses are reasonably ascertainable; any person, agency, organization or institution having actual care, control, or custody of a minor child; and any person, agency, organization or institution required by court order to provide for the support of a minor child, either in whole or in part, not named as parties and served with process in an action or proceeding for the support of such child, shall be given notice by the party raising the issue of support.

(2) The notice herein required shall be in the manner provided by the Rules of Civil Procedure for the service of notices in actions. Such notice shall advise the person to be notified of the name of the child, the names of the parties to the action or proceeding, the court in which the action or proceeding was instituted, and the date thereof.

(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.

(4) Any person required to be given notice as herein provided may intervene in an action or proceeding for support of a minor child by filing in apt time notice of appearance or other appropriate pleadings.

(f) Venue. — An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation is ordered, shall determine in which court such consolidated action or proceeding shall be heard.

(g) Custody and Support Irrespective of Parents' Rights Inter Partes. — Orders for custody and support of minor children may be entered when the matter is before the court as provided by this section, irrespective of the rights of the wife and the husband as between themselves in an action for annulment or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(h) Court Having Jurisdiction. — When a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court, and may be heard at any time.

(i) District Court; Denial of Parental Visitation Right; Written Finding of Fact. — In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

(j) Custody and Visitation Rights of Grandparents. — In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. (1858-9, c. 53, s. 2; 1871-2, c. 193, ss. 39, 46; Code, ss. 1292, 1296, 1570, 1662; Rev., ss. 1567, 1570, 1854; 1919, c. 24; C.S., ss. 1664, 1667, 2242; 1921, c. 13; 1923, c. 52; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1951, c. 893, s. 3; 1953, cc. 813, 925; 1955, cc. 814, 1189; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2; 1971, c. 1185, s. 24; 1973, c. 751; 1979, c. 110, s. 12; c. 563; c. 709, s. 3; 1981, c. 735, s. 3; 1983, c. 587; 1985, c. 575, s. 4; 1987 (Reg. Sess., 1988), c. 893, s. 3.1.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective October 1, 1988, added subdivision (d)(3).

Legal Periodicals. —

For article, "Equating a Stepparent's Rights and Liabilities vis-a-vis Custody, Visitation and Support upon Dissolution of the Marriage with Those of the Natural Parent — An Equitable Solution to a Growing Dilemma?", see 17 N.C. Cent. L.J. 1 (1988).

CASE NOTES

I. In General.
III. Jurisdiction and Venue.
  A. In General.
  B. Full Faith and Credit.
IV. Notice.
VII. Visitation Rights.
  B. Denial of Parents' Rights.

I. IN GENERAL.

Stated in Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

Cited in Shingledecker v. Shingledecker, 103 N.C. App. 783, 407 S.E.2d 589 (1991); Ray v. Ray, 103 N.C. App. 790, 407 S.E.2d 592 (1991); Brooks v. Brooks, 107 N.C. App. 44, 418 S.E.2d 534 (1992); Wake County ex rel. Horton v. Ryles, 112 N.C. App. 754, 437 S.E.2d 404 (1993).

III. JURISDICTION AND VENUE.

A. In General.

Venue Provision. — Subdivision (f) of this section, enacted in 1967, is the venue provision for a child support action. Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

Action to Determine Support Is in Personam. —

An action for child support is an action in personam and is governed by jurisdictional rules as in actions for the payment of money or the transfer of property. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Failure to Raise Issue of Child Support. — Defendant's mere mentioning of "a Separation Agreement dated June 5, 1981" in his 1982 divorce complaint was insufficient to raise the issue of child support. Defendant's divorce complaint did not ask the divorce court to review the question of child support and the divorce judgment did not even allude to the parties' separation agreement; therefore, defendant's contention that his prior divorce action placed the question of child support at issue with the results that (i) the original divorce court retained jurisdiction over that question and (ii) the present independent action by his wife should have been dismissed under a theory of abatement, was rejected. Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991), appeal dismissed, 331 N.C. 286, 417 S.E.2d 254 (1992).

B. Full Faith and Credit.

Indiana Order for Child Support Given Full Faith and Credit. — Although there was no jurisdictional rule requiring the trial court to dismiss plaintiff father's North Carolina action seeking definition of his child support obligations simply because defendant mother had filed an action in Indiana, where, when plaintiff's motion came on for hearing, the Indiana court had already entered an order on the issue of child support, that order was entitled to full faith and credit in this State as long as plaintiff was not denied due process of law in the Indiana court's assertion of jurisdiction over him. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

IV. NOTICE.

Request for Variance for Child Support Guidelines. — Section 50-13.4 does not identify any time restrictions for making the request for a hearing. However, to effectuate the purpose of that statute, any party in a pending action requesting a variance from the guidelines must, unless the request is made in the original pleadings, give at least ten days written notice as required by this section. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Absent a timely and proper request for a variance of the guidelines, support set consistent with the guidelines was conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education, and maintenance. Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

No Notice. — Where there was no motion for custody before the trial court, there was no notice of a motion for custody as required by subdivision (d)(1) of this section. Jones v. Jones, 109 N.C. App. 293, 426 S.E.2d 468 (1993).

VII. VISITATION RIGHTS.

B. Denial of Parents' Rights.

Findings Held Sufficient. —

Judge did not err by imposing excessive restrictions on mother's visitations with her son; evidence supported the judge's finding that mother's demonstrations of anger and hostility in the presence of the child and her frustration of the relationship between the child and father necessitated, for the child's best interest, the restrictions the judge imposed on the visitation. Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

Legal Periodicals. —

For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina," see 10 Campbell L. Rev. 111 (1987).

CASE NOTES

I. In General.
II. Actions for Support Only.

I. IN GENERAL.

Attorneys' fees are not recoverable in an action for equitable distribution, etc. —

In accord with the main volume. See Holder v. Holder, 87 N.C. App. 578, 361 S.E.2d 891 (1987).

Applicability in Action Involving Illegitimate Child. —

Attorneys' fees incurred in prosecuting paternity actions may not be awarded under this section, but may only be assessed as costs under § 6-21(10). Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

The amount awarded as counsel fees, etc. —

In a custody and support action, once the statutory requirements of this section have been met, whether to award attorney's fees and in what amounts is within the sound discretion of the trial judge and is only reviewable based on an abuse of discretion. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

Findings of Fact Must Support Reasonableness, etc. —

An order awarding counsel fees in a child support or alimony action must contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered, the time and skill required, and the attorney's hourly rate in comparison to the customary charges of attorneys practicing in that general area. Weaver

v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

Award of Fees Held Error. —

Findings were inadequate to support an award for payment of attorneys' fees where trial court failed to make specific findings of fact required by statute and case law and instead found only that plaintiff did not have the ability to defray the costs and expenses to employ adequate representation, that the attorney had provided valuable services, and that the attorney expended in excess of five hours representing plaintiff. Cameron v. Cameron, 94 N.C. App. 168, 380 S.E.2d 121 (1989).

Where plaintiff introduced affidavits of her legal expenses but trial court made no findings on all the factors required under this section, award of attorneys' fees was vacated. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Award of Fees, etc. —

Where both of plaintiff's attorneys, who represented her in the custody and support hearings, submitted detailed affidavits of their experience, time, and preparation of the case, the trial judge properly found that an attorneys' fee of $80.00 per hour for 75 and 10 hours of time respectively was a reasonable amount to award for time spent on the issue of support only. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

Reservation of Issue of Fees when Judgment Rendered. — Since the trial court expressly reserved the issue of attorney's fees at the time it rendered judgment as to the custody matters before it, it retained the authority to consider the issue since attorney's fees were within the court's "oral announcements." Surles v. Surles, 113 N.C. App. 32, 437 S.E.2d 661 (1993).

Review of Attorney's Fees on Appeal. —

The trial court committed error in failing to make adequate findings of fact to support its denial of attorney's fees. Gowing v. Gowing, 111 N.C. App. 613, 432 S.E.2d 911 (1993).

Applied in Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990); Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992).

Stated in Craig v. Kelley, 89 N.C. App. 458, 366 S.E.2d 249 (1988); McLemore v. McLemore, 89 N.C. App. 451, 366 S.E.2d 495 (1988).

Cited in Glatz v. Glatz, 98 N.C. App. 324, 390 S.E.2d 763 (1990); Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990).

II. ACTIONS FOR SUPPORT ONLY.

Findings Required in Action for Support. —

Where trial court's order was devoid of any statutorily required findings of fact, the award of attorneys' fees could not stand. Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Plaintiff's contention that proceeding was solely one for support was without merit, where plaintiff's modification motion initially put the issue of custody before the court, even though the issue of custody was quickly settled by agreement. Theokas v. Theokas, 97 N.C. App. 626, 389 S.E.2d 278, cert. denied, 327 N.C. 437, 395 S.E.2d 697 (1990).

§ 50-13.7. Modification of order for child support or custody.

CASE NOTES

- I. In General.
- II. Modification, Generally.
- III. Change in Circumstances.
- V. Findings and Discretion of Trial Court.
- VII. Procedure.

I. IN GENERAL.

Section 50-13.2A must be read in pari materia with subsection (a), which therefore requires a showing of a substantial change of circumstances. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Use of Word "May". — Where defendant contended that the use of the word "may" in this statute authorizes the trial court in the exercise of its discretion to refuse to exercise its jurisdiction, he misconstrued the statute. The word "may" authorizes the trial judge to enter an order of modification upon a showing of changed circumstances. Morris v. Morris, 91 N.C. App. 432, 371 S.E.2d 756 (1988).

Applied in Bowen v. Gilliard, 483 U.S. 587, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987); Koufman v. Koufman, 330 N.C. 93, 408 S.E.2d 729 (1991).

Quoted in Craig v. Kelley, 89 N.C. App. 458, 366 S.E.2d 249 (1988).

Stated in Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

Cited in Jones v. Jones, 109 N.C. App. 293, 426 S.E.2d 468 (1993).

II. MODIFICATION, GENERALLY.

This section gives North Carolina courts subject matter jurisdiction to modify child support orders entered by another state. Morris v. Morris, 91 N.C. App. 432, 371 S.E.2d 756 (1988).

And Is Temporary in Nature. — Although they provide guidance, prior custody orders are not binding in subsequent proceedings. Custody orders are not permanent, but remain freely modifiable upon appropriate evidence of changed circumstances. Williams v. Williams, 91 N.C. App. 469, 372 S.E.2d 310 (1988).

Change in Circumstances Is Threshold Issue. — Modification of a support order cannot occur until the threshold issue of substantial change in circumstances has been shown. Davis v. Risley, 104 N.C. App. 798, 411 S.E.2d 171 (1991).

Party Required to Demonstrate Substantially Changed Circumstances. — Under this section, a party is required to demonstrate substantially changed circumstances affecting the welfare of the child in order to be granted a modification of an existing custody order. The word custody under the statute also includes visitation. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

Modification of Payments Accrued After Motion Filed. — Any child support payments which accrued after the filing of mother's motion for an increase based on changed circumstances could be subject to modification as provided by law. Mackins v. Mackins, 114 N.C. App. 538, 442 S.E.2d 352 (1994).

The trial court must determine the present reasonable needs, etc. —

In accord with the main volume. See Smith v. Smith, 89 N.C. App. 232, 365 S.E.2d 688 (1988).

To properly determine child's present reasonable needs, etc. —

In accord with the main volume. See Smith v. Smith, 89 N.C. App. 232, 365 S.E.2d 688 (1988).

Inclusion of Estimated Expenses for Items That Custodial Parent Cannot Currently Afford Not Improper. — In support modification proceedings it was not improper for the court to include in its findings estimated expenses for certain items that plaintiff could not currently afford; simply because a custodial parent is unable to afford a certain item or expense is no reason to disqualify that item as a reasonable need of the child. Findings of fact as to actual past expenditures are meant to aid the trial court in determining the reasonable needs of the children, not to hamper the court's ability to assess the children's reasonable needs. Smith v. Smith, 89 N.C. App. 232, 365 S.E.2d 688 (1988).

Evidence of Child-Oriented Expenses in Modification Hearings. — In seeking a modification of child support, the moving party must present evidence of child-oriented expenses, including the amount of those expenses at the time of the original support hearing. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Where although father, the custodial parent, presented some evidence of present and future expenses, he presented no evidence of child-oriented expenses at the time of the prior hearing, the trial court did not have all of the evidence necessary to establish a change of circumstances and did not err in refusing to modify plaintiff's child support. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Modification When One of Several Children Reaches Age 18. — While child support obligations ordered by a court terminate upon the child reaching age 18, unless the child is otherwise emancipated prior to reaching age 18 or the trial court in its discretion continues to enforce the payment obligation after the child reaches age 18 and while the child is in primary or secondary school, when one of two or more minor children for whom support is ordered reaches age 18, and when the support ordered to be paid is not allocated as to each individual child, the supporting parent has no authority to unilaterally modify the amount of the child support payment. The supporting parent must apply to the trial court for modification. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

Cases holding that where one of two minor children reaches the age of 18, a trial court may retroactively modify child support arrearages when equitable considerations exist which would create an injustice if modification is not allowed, were decided before § 50-13.10 became effective on October 1, 1987. Under this statute, if the supporting party is not disabled or incapacitated, a past due, vested child support payment is subject to divestment only as provided by law, and if, but only if, a written motion is filed, and due notice is given to all parties before the payment is due. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

III. CHANGE IN CIRCUMSTANCES.

A change in circumstances must be shown, etc. —

Where a Virginia court which had issued a divorce decree denied modification of the original child support order, and the former spouse and minor children were living in North Carolina, U.S. Const., Art. IV, § 1 required the Virginia order denying modification to be given full faith and credit in North Carolina subject to changed circumstances under this section. Morris v. Morris, 91 N.C. App. 432, 371 S.E.2d 756 (1988).

A Georgia divorce judgment precluded a North Carolina court from making any findings as to child support without a showing of a change in circumstances. Shores v. Shores, 91 N.C. App. 435, 371 S.E.2d 747 (1988).

Trial court erred in modifying an existing support decree from the State of Georgia when there were no findings of fact or conclusions of law showing a change of circumstances to support such a conclusion. Shores v. Shores, 91 N.C. App. 435, 371 S.E.2d 747 (1988).

Without evidence of any change of circumstances affecting the welfare of the child or an increase in need, an increase for support based solely on the ground that the support payor's income has increased is improper. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

Meaning of "Changed Circumstances". —

Although a court must make findings concerning the party's ability to pay, the changed circumstances with which the courts are concerned are those relating to child-oriented expenses. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

The moving party has the burden of showing a substantial change, etc. —

In accord with last paragraph in the main volume. See Woncik v. Woncik, 82 N.C. App. 244, 346 S.E.2d 277 (1986).

Removal of Parent to Another Residence. —

In accord with second paragraph in the main volume. See Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

Removal of Child to Another Jurisdiction. —

Although it is not so as a matter of law, it will be a rare case where the child will not be adversely affected when a relocation of the custodial parent and child requires substantial alteration of a successful custody-visitation arrangement in which both parents have substantial contact with the child. Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

Father Met Burden of Showing Adverse Effect of Relocation. — Father met his burden of showing that the proposed relocation of mother and child to California likely would adversely affect the welfare of the child, and thus the "best interest" question was properly before the trial court. Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

Ability to Pay. — Where there was no evidence that the needs of defendant's minor children had changed; however, there was evidence that defendant's ability to pay his support payments had decreased, the decision of the trial court denying motion for reduction of support was remanded to the district court. Pittman v. Pittman, 114 N.C. App. 808, 443 S.E.2d 96 (1994).

Imposition of Earnings Capacity Rule. —

In accord with first paragraph in the main volume. See Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

A person's capacity to earn income may be made the basis of an award if there is a finding that the party deliberately depressed his or her income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

Consideration of Spouse's Capacity to Earn Held Error. — Trial court could not consider father's capacity to earn in computing his income where the evidence indicated that he lost his job due to no fault of his own, and the court's order contained no findings that he had deliberately stopped working to avoid his support obligations. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

Arbitrary termination of visitation rights of grandparents by mother constituted a substantial change of circumstances where the grandparents had established a continuing substantial relationship with their grandchildren since the entry of earlier custody order, and the court found sufficient facts to justify its conclusion that it was in the best interest of the grandchildren to maintain a continuing relationship with the grandparents through the granting of visitation privileges. Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

Parent Denied Custody Despite Doctor's Recommendation. — Although doctor recommended that custody should continue with mother, it was not an abuse of discretion for judge to order a change of custody of the child from mother to father where doctor testified that the child had severe emotional problems requiring "substantial immediate change", that the visitation schedule be limited, and that one parent (mother) exercise more control; the judge agreed with doctor that the child's problems needed immediate remedy; however, he believed that father was the parent to exercise more control. Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

Change in Circumstances Shown. —

The trial court did not err in transferring custody of the minor child to defendant where the financial strain caused by plaintiff's loss of her job and the birth of two additional children within two years out of wedlock clearly constitutes a substantial change of circumstances. White v. White, 90 N.C. App. 553, 369 S.E.2d 92 (1988).

In child custody action, findings supported trial court's conclusion that there had been a substantial change of circumstances since the order where father had consistently attempted to thwart efforts by the defendant to maintain and develop a mother-child relationship with child, where father threatened to stop or disallow visitation by the mother with the child, and where mother's home life and family situation changed and improved since the order. Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989).

Evidence about child's psychological state supported judge's finding of a substantial change of circumstances and the change of custody of the child from the mother to the father where doctor testified that the disappearance of child's emotional equilibrium occurred during a period when the predominate parental influence upon him was mother and that a possible cause of the child's problems was his mother's hostility which centered around the child's visitations with father, visitations which were often interfered with by mother. Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

Showing of Changed Circumstances Held Insufficient. —

In a case where the sole finding of fact regarding a change of circumstances was a general finding that the child was older and that inflation had occurred, this, standing alone, was inadequate to support an order of increased support payments. Holder v. Holder, 87 N.C. App. 578, 361 S.E.2d 891 (1987).

In a child custody order modifying the rights of defendant, the evidence was insufficient to show a substantial change in circumstances since the only change was defendant's new job enabling him to keep child with him at work and plaintiff's plans to marry, her increased income and that she no longer lived with her mother. Hinton v. Hinton, 87 N.C. App. 676, 362 S.E.2d 287 (1987).

Findings of fact found by the trial court held supported by the evidence and clearly and more than amply supported the court's conclusion that defendant had failed to show a substantial change of circumstances that would warrant a modification of consent judgment providing for alimony and child support. Outlaw v. Outlaw, 89 N.C. App. 538, 366 S.E.2d 247 (1988).

In an action to modify child support provisions of a separation agreement which has not previously been incorporated into an order or judgment of the court, the court is called upon, for the first time, to make a determination that the reasonable needs of the children are provided for in accordance with the abilities of those responsible for the children's support. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

Reduction of Custodial Parent's Income on Return to School. — Trial court erred in concluding reduction in income of father, custodial parent, due to leaving employment to return to school could not be considered on motion to increase wife's child support obligations. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

V. FINDINGS AND DISCRETION OF TRIAL COURT.

When Capacity to Pay May Be Basis for Award. — Under § 50-13.4 and this section, a party's ability to pay child support is ordinarily determined by the party's actual income at time support award is made or modified. However, if there is a finding by the trial court that the party was acting in bad faith by deliberately depressing his or her income or otherwise disregarding the obligation to pay child support, then the party's capacity to earn may be the basis for the award. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Trial Court Required to Make Specific Findings. — It is not sufficient that there may be evidence in the record sufficient to support findings that could have been made; the trial court is required to make specific findings of fact with respect to factors listed in the statute. Such findings are required in order for the appellate court to determine whether the trial court gave "due regard" to the factors listed. Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991).

Findings as to Child's Best Interests. — In making the best interest decision, the trial court is vested with broad discretion and can be reversed only upon a showing of abuse of discretion. Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

In exercising its discretion in determining the best interest of the child in a relocation case, factors appropriately considered by the trial court include but are not limited to: the advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent. Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

Finding That Father Is Fit. — That the father is a fit person to have sole or joint custody of the children, by itself, is no basis for modifying the order previously entered. Ratley v. Ratley, 99 N.C. App. 219, 392 S.E.2d 653 (1990).

But the trial court may not sua sponte enter an order modifying a previously entered custody decree. Kennedy v. Kennedy, 107 N.C. App. 695, 421 S.E.2d 795 (1992).

Good Faith Finding Required. — Determination of the trial court that it was not necessary to make a finding of bad faith in reduction of income where the party seeking support modification was the custodial parent was not supported by current case law, nor was the trial court correct in concluding that when a custodial parent sought a change of child support based upon a reduction in income, that custodial parent had to request the court to make a finding of fact as to his or her good faith. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Must Be Sufficient Evidence of Proscribed Intent. — A trial court's conclusion underlying imposition of the earnings capacity rule must be based upon evidence that the actions which reduced the party's income were not taken in good faith. There must be sufficient evidence of the proscribed intent. Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

Court's Discretion To Permit Relocation. — Although most relocations will present both advantages and disadvantages for the child, when the disadvantages are outweighed by the advantages, as determined and weighed by the trial court, the trial court is well within its discretion to permit the relocation. Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992).

Findings Held Insufficient. — In an action seeking an increase in child support over the amount set forth in separation agreement, the order which contained no specific findings with respect to the actual past or present expenses incurred for the support of the children was insufficient to support the court's conclusion that the reasonable needs of the children amounted to $2,800.00 per month. Holderness v. Holderness, 91 N.C. App. 118, 370 S.E.2d 602 (1988).

VII. PROCEDURE.

Premature Request for Modification. — Plaintiff's request that trial court alter provisions in incorporated separation agreement for modification of child support payments and payments for wife's separate maintenance after July, 1990, was properly denied as premature where the date in question had not yet occurred. Theokas v. Theokas, 97 N.C. App. 626, 389 S.E.2d 278 (1990).

§ 50-13.8. Custody of persons incapable of self-support upon reaching majority.

For the purposes of custody, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support. (1967, c. 1153, s. 2; 1971, c. 218, s. 3; 1973, c. 476, s. 133; 1979, c. 838, s. 29; 1989, c. 210.)

Effect of Amendments. — The 1989 amendment, effective June 5, 1989, substituted "Custody" for "Support" in the catchline.

CASE NOTES

Father Held Not Obligated to Support Mentally Retarded Son Beyond Twentieth Birthday. — Where petitioner mother moved the court to require respondent father to continue to pay child support for their mentally retarded son beyond his twentieth birthday and court ordered respondent to pay $600.00 per month continuing ongoing child support without regard to the child's chronological age in light of the plain and definite meaning of the section, the trial court erred and respondent was not obligated to support his son beyond his twentieth birthday. Yates v. Dowless, 93 N.C. App. 787, 379 S.E.2d 79, aff'd, 325 N.C. 703, 386 S.E.2d 200 (1989).

Defendant's Obligation Abrogated by Amendment of Section. — Where defendant's obligation, set out in a consent judgment, to continue supporting his disabled child beyond her minority had been abrogated by the 1979 amendment of this section, which eliminated the requirement compelling parents to continue supporting their disabled children beyond their minority, and he had not contracted to continue the payments apart from that obligation, an order requiring defendant to continue supporting the child had no legal basis. Jackson v. Jackson, 102 N.C. App. 574, 402 S.E.2d 869 (1991).

§ 50-13.9. Procedure to insure payment of child support.

(a) Upon its own motion or upon motion of either party, the court may order at any time that support payments be made to the clerk of court for remittance to the party entitled to receive the payments. For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) shall apply.

(b) After entry of such an order by the court, the clerk of court shall maintain records listing the amount of payments, the date payments are required to be made, and the names and addresses of the parties affected by the order.

In IV-D cases, when required by federal or state law or regulations or by court order, the clerk of superior court shall transmit child support payments that are made to the clerk to the Department of Human Resources for appropriate distribution. In all other cases, whether IV-D or non-IV-D, the clerk shall transmit the payments to the custodial parent or other party entitled to receive them, unless a court order requires otherwise.

(c) The parties affected by the order shall inform the clerk of court of any change of address or of other condition that may affect the administration of the order. The court may provide in the order that a party failing to inform the court of a change of address within a reasonable period of time may be held in civil contempt.

(d) In a non-IV-D case, when an obligor fails to make a required payment of child support and is in arrears, the clerk of superior court shall mail by regular mail to the last known address of the obligor a notice of delinquency. The notice shall set out the amount of child support currently due and shall demand immediate payment of said amount. The notice shall also state that failure to make immediate payment will result in the issuance by the court of an enforcement order requiring the obligor to appear before a district court judge and show cause why the support obligation should not be enforced by income withholding, contempt of court, or other appropriate means. Failure to receive the delinquency notice shall not be a defense in any subsequent proceeding. Sending the notice of delinquency shall be in the discretion of the clerk if the clerk has, during the previous 12 months, sent a notice or notices of delinquency to the obligor for nonpayment, or if income withholding has been implemented against the obligor or the obligor has been previously found in contempt for nonpayment under the same child support order.

If the arrearage is not paid in full within 21 days after the mailing of the delinquency notice, or without waiting the 21 days if the clerk has elected not to mail a delinquency notice for any of the reasons provided herein, the clerk shall cause an enforcement order to be issued and shall issue a notice of hearing before a district court judge. The enforcement order shall order the obligor to appear and show cause why he should not be subjected to income withholding or adjudged in contempt of court, or both, and shall order the obligor to bring to the hearing records and information relating to his employment and the amount and sources of his disposable income. The enforcement order shall state:

(1) That the obligor is under a court order to provide child support, the name of each child for whose benefit support is due, and information sufficient to identify the order;

(2) That the obligor is delinquent and the amount of overdue support;

(3) That the court may order income withholding if the obligor is delinquent in an amount equal to the support due for one month;

(4) That income withholding, if implemented, will apply to the obligor's current payors and all subsequent payors and will be continued until terminated pursuant to G.S. 110-136.10;

(5) That failure to bring to the hearing records and information relating to his employment and the amount and sources of his disposable income will be grounds for contempt;

(6) That if income withholding is not an available or appropriate remedy, the court may determine whether the obligor is in contempt or whether any other enforcement remedy is appropriate.

The enforcement order may be signed by the clerk or a district court judge, and shall be served on the obligor pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. The clerk shall also notify the party to whom support is owed of the pending hearing. The clerk may withdraw the order to the supporting party upon receipt of the delinquent payment. On motion of the person to whom support is owed, with the approval of the district court judge, if he finds it is in the best interest of the child, no enforcement order shall be issued.

When the matter comes before the court, the court shall proceed as in the case of a motion for income withholding under G.S. 110-136.5. If income withholding is not an available or adequate remedy, the court may proceed with contempt, imposition of a lien, or other available, appropriate enforcement remedies.

This subsection shall apply only to non-IV-D cases, except that the clerk shall issue an enforcement order in a IV-D case when requested to do so by an IV-D obligee.

(e) The clerk of court shall maintain and make available to the district court judge a list of attorneys who are willing to undertake representation, pursuant to this section, of persons to whom child support is owed. No attorney shall be placed on such list without his permission.

(f) At least seven days prior to an enforcement hearing as set forth in subsection (d), the clerk must notify the district court judge of all cases to be heard for enforcement at the next term, and the judge shall appoint an attorney from the list described in subsection (e) to represent each party to whom support payments are owed if the judge deems it to be in the best interest of the child for whom support is being paid, unless:

(1) The attorney of record for the party to whom support payments are owed has notified the clerk of court that he will appear for said party; or

(2) The party to whom support payments are owed requests the judge not to appoint an attorney; or

(3) An attorney for the enforcement of child support obligations pursuant to Title IV, Part D, of the Social Security Act as amended is available.

The judge may order payment of reasonable attorney's fees as provided in G.S. 50-13.6.

(g) Nothing in this section shall preclude the independent initiation by a party of proceedings for civil contempt or for income withholding. (1983, c. 677, s. 1; 1985 (Reg. Sess., 1986), c. 949, ss. 3-6; 1989, c. 479; 1993, c. 517, s. 6; c. 553, s. 67.1.)

Effect of Amendments. — The 1989 amendment, effective January 1, 1990, in subsection (d), rewrote the last sentence of the first paragraph and substituted the language beginning "without waiting the 21 days" and ending "provided herein, the clerk" for "is not paid within 30 days after the obligor becomes delinquent if the clerk has elected not to send a delinquency notice, the clerk" in the first sentence of the second paragraph.

Session Laws 1993, c. 517, s. 6, effective January 1, 1994, and applicable to all orders entered on or after that date, as amended by Session Laws 1993, c. 553, s. 67.1, effective July 24, 1993, in subsection (a) added the second sentence.

Legal Periodicals. — For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

§ 50-13.10. Past due child support vested; not subject to retroactive modification; entitled to full faith and credit.

Legal Periodicals. — For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina," see 10 Campbell L. Rev. 111 (1987).

CASE NOTES

Modification When One of Several Children Reaches Age 18. — While child support obligations ordered by a court terminate upon the child reaching age 18, unless the child is otherwise emancipated prior to reaching age 18 or the trial court in its discretion continues to enforce the payment obligation after the child reaches age 18 and while the child is in primary or secondary school, when one of two or more minor children for whom support is ordered reaches age 18, and when the support ordered to be paid is not allocated as to each individual child, the supporting parent has no authority to unilaterally modify the amount of the child support payment. The supporting parent must apply to the trial court for modification. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

Cases holding that where one of two minor children reaches the age of 18, a trial court may retroactively modify child support arrearages when equitable considerations exist which would create an injustice if modification is not allowed, were decided before this section became effective on October 1, 1987. Under this statute, if the supporting party is not disabled or incapacitated as provided by subdivision (a)(2), a past due, vested child support payment is subject to divestment only as provided by law, and if, but only if, a written motion is filed, and due notice is given to all parties before the payment is due. Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

Retroactive Modification of Support Payments. — Child support payments may not be reduced retroactively so as to grant relief from arrearages, absent a compelling reason. Van Nynatten v. Van Nynatten, 113 N.C. App. 142, 438 S.E.2d 417 (1993).

Oral agreement to modify child support payments would not justify noncompliance with the statute, and an obligor parent would still be required to apply to the court before altering his payments. Van Nynatten v. Van Nynatten, 113 N.C. App. 142, 438 S.E.2d 417 (1993).

Equitable Estoppel Did Not Bar Claim for Past Support. — Even assuming that on some set of facts equitable estoppel might properly bar a claim for child support arrears, it was inapplicable where husband, seeking to rely on equitable estoppel could not show that, in good faith reliance on the conduct of his ex-wife, he had changed his position for the worse; the only change made in his position was the retention to his benefit of money owed for the support of his children. Griffin v. Griffin, 96 N.C. App. 324, 385 S.E.2d 526 (1989).

Where defendant made no motion for modification of a foreign support order, the North Carolina trial court was without authority to modify, in any way for any reason, past due child support payments; and defendant was not entitled to credit for any sums given directly to the child outside of the foreign support order. Pieper v. Pieper, 108 N.C. App. 722, 425 S.E.2d 435 (1993).

Modification Not Retroactive. — Where plaintiff filed her motion to modify the child support payments on March 27, 1991 and the trial court entered an order on February 18, 1993 increasing defendant's child support obligation from $800 per month to $1,230 per month effective April 1, 1991, the trial court noted that on the the date this order was entered, the effective date of the time the payments were to begin had passed and ordered defendant to pay $9,890 to the Clerk of Superior Court representing the increase in child support payments for the months of April, 1991 through February, 1993; because April, 1991 was subsequent to the March 27, 1991 filing of the plaintiff's motion, the trial court's order was not a retroactive modification. Mackins v. Mackins, 114 N.C. App. 538, 442 S.E.2d 352 (1994).

Evidence of Emergency Situation. — A child support payment may not be retroactively increased without evidence of some emergency situation that required the expenditure of sums in excess of the amount of child support paid. Mackins v. Mackins, 114 N.C. App. 538, 442 S.E.2d 352 (1994).

Modification on Amount Accrued After Filing. — A trial court has the discretion to make a modification of a child support order effective from the date a petition to modify is filed as to support obligations that accrue after such date. Mackins v. Mackins, 114 N.C. App. 538, 442 S.E.2d 352 (1994).

Applied in Williams v. Williams, 105 N.C. App. 615, 414 S.E.2d 80 (1992).

Quoted in Tate v. Tate, 95 N.C. App. 774, 384 S.E.2d 48 (1989); Sikes v. Sikes, 330 N.C. 595, 411 S.E.2d 588 (1992).

§ 50-13.11. Orders and agreements regarding medical support for minor children.

(a) The court may order a parent of a minor child or other responsible party to provide medical support for the child, or the parties may enter into a written agreement regarding medical support for the child. An order or agreement for medical support may require one or both parties to maintain health insurance, dental insurance, or both, or to pay the medical, hospital, or dental expenses.

(b) The party ordered or under agreement to provide medical insurance shall provide written notice of any change in the applicable insurance coverage to the other party.

(c) The employer or insurer of the party required to provide medical, hospital, and dental insurance shall release to the other party, upon written request, any information on a minor child's insurance coverage that the employer or insurer may release to the party required to provide medical, hospital, and dental insurance.

(d) When a court order or agreement for medical insurance is in effect, the signature of either party shall be valid authorization to the insurer to process an insurance claim on behalf of a minor child.

(e) If the party who is required to provide medical insurance fails to maintain the insurance coverage for the minor child, the party shall be liable for any medical, hospital, or dental expenses incurred from the date of the court order or agreement that would have been covered by insurance if it had been in force. (1989 (Reg. Sess., 1990), c. 1067, s. 1; 1991, c. 419, s. 2; c. 761, s. 42.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 1067, s. 4, made this section effective October 1, 1990, and applicable to court orders and written agreements entered on or after that date.

Effect of Amendments. — Session Laws 1991, c. 419, s. 2, as amended by

Session Laws 1991, c. 761, s. 42, effective October 1, 1991, in subsection (c) inserted "hospital, and dental" preceding "shall release" and following "to the party required to provide medical".

§ 50-16.1. Definitions.

Legal Periodicals. —

For comment, "Alimony Reform for North Carolina," see 18 N.C. Cent. L.J. 87 (1989).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

CASE NOTES

I. In General.
IV. Dependent Spouse.

I. IN GENERAL.

Applied in Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

Quoted in Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

Cited in Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706 (1988); Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988); Rudisill v. Rudisill, 102 N.C. App. 280, 401 S.E.2d 818 (1991); Caldwell v. Caldwell, 103 N.C. App. 380, 405 S.E.2d 588 (1991); Rogers v. Rogers, 111 N.C. App. 606, 432 S.E.2d 907 (1993); Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994).

IV. DEPENDENT SPOUSE.

For a spouse to be "actually substantially dependent", etc. —

In accord with second paragraph in the main volume. See Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

The term "actually substantially dependent," as used in the first portion of the definition in subdivision (3), means that the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation; thus to qualify as a dependent spouse under that portion of subdivision (3), the spouse seeking alimony must be actually without means for providing for his or her accustomed standard of living. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

And Even Spouse Who Is Not "Actually Substantially Dependent" May Be Substantially in Need. — Even where a spouse is not "actually substantially dependent," the spouse may be a dependent spouse under the second part of subdivision (3) of this section if he or she is substantially in need of maintenance and support, the meaning of which is determined by construing this statute in pari materia with the terms of § 50-16.5. Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

The trial court must evaluate the parties' income and expenses measured by the standard of living of the family as a unit in order to determine if a spouse is "actually substantially dependent." Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

Spouse Not Dependent. —

Where the uncontradicted evidence disclosed that the year before the parties separated, the plaintiff had an income of $18,339.97 and the defendant had an income of $20,475.11, and the year they separated, the plaintiff's income was $19,301.46 and the defendant's income was $24,447.26, and that during the last year that they lived together, they maintained separate bank accounts and divided household expenses, evidence did not support the ultimate finding that the plaintiff was substantially and materially dependent upon the defendant for her support and maintenance, and the trial court erred in awarding the plaintiff alimony. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

Trial court did not err by finding wife's pleadings were insufficient on their face and dismissing her action for alimony pendente lite; plaintiff asserted in her complaint that she was a "dependent spouse," but the only support she offered for this conclusion was evidence of her husband's salary and she did not present any evidence that she needed assistance to subsist during the prosecution or defense of the suit. Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989), cert. denied, 326 N.C. 50, 389 S.E.2d 94 (1990).

Spouse Held Dependent. —

Where plaintiff's budget of $2800 per month was both reasonable and commensurate with the standard of living which the couple maintained prior to the date of the separation, plaintiff had no income producing assets, but earned a net income of $1353 per month, and defendant's gross income was nearly four times that of plaintiff, these findings supported trial court's determination that plaintiff was a dependent spouse and that defendant was a supporting spouse. Ellinwood v. Ellinwood, 94 N.C. App. 682, 381 S.E.2d 162 (1989).

§ 50-16.2. Grounds for alimony.

Legal Periodicals. —

For comment, "Alimony Reform for North Carolina," see 18 N.C. Cent. L.J. 87 (1989).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

For article, "Maintenance, Alimony, and the Rehabilitation of Family Care," see 71 N.C.L. Rev. 721 (1993).

CASE NOTES

I. In General.
II. Adultery.
III. Abandonment.

I. IN GENERAL.

Lack of Grounds. — The plain and definite meaning of § 50-16.11 is that when a jury or trial judge finds that none of the grounds on which a spouse alleges entitlement to permanent alimony pursuant to § 50-15.2 exists, the trial court, in its discretion, may order recoupment of any alimony pendente lite paid by the supporting spouse. Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

Identification of Support Payments. — Whether support payments are in fact alimony does not depend on whether order refers to it as "alimony" but instead on whether support payments constitute "reciprocal consideration" for property settlement provision of order. Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990).

Post-Separation Failure to Provide Necessary Subsistence. — Absent a valid separation agreement waiving all alimony rights under § 50-16.6(b), post-separation failure to provide a dependent-spouse with necessary subsistence gives rise to an action for alimony. Brown v. Brown, 104 N.C. App. 547, 410 S.E.2d 223 (1991), cert. denied, 331 N.C. 383, 417 S.E.2d 789 (1992).

Cited in Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989); Rogers v. Rogers, 111 N.C. App. 606, 432 S.E.2d 907 (1993); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993).

II. ADULTERY.

To determine whether the dependent spouse was entitled to alimony and, if so, in what amount, the trial judge was required to weigh evidence of adultery by the supporting spouse as well as evidence of indignities offered by both the supporting and the dependent spouse. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Section Does Not Distinguish Between Pre-Separation and Post-Separation Adultery. — Until the State grants them an absolute divorce, a couple, though separated from each other, continues to be wife and husband; therefore, this section, which sets down the fault grounds for alimony, does not distinguish between pre-separation and post-separation adultery. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

Sexual Intercourse with Third Party During Period of Separation Is Adultery. — Voluntary sexual intercourse by a spouse with a third party during the period of separation required by § 50-6 is adultery as contemplated by this section, and is a ground for alimony. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

III. ABANDONMENT.

Constructive abandonment may be shown by mental or physical cruelty or willful failure of the defaulting spouse to fulfill obligations of the marriage. Ellinwood v. Ellinwood, 88 N.C. App. 119, 362 S.E.2d 584 (1987).

Proof of constructive abandonment may not be based on evidence of actions after the parties separated. Ellinwood v. Ellinwood, 88 N.C. App. 119, 362 S.E.2d 584 (1987).

Findings of Trial Court Held Insufficient on Question of Abandonment. — The findings and conclusions of the trial court were held insufficient to resolve the question raised by the defendant as to whether the plaintiff did in fact abandon the defendant, either actually or constructively, and would therefore be vacated and remanded for more detailed findings and conclusions with respect to the defendant's claim for alimony. Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

§ 50-16.3. Grounds for alimony pendente lite.

Legal Periodicals. —

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

CASE NOTES

- I. In General.
- II. Prerequisites.
- IV. Amount.
- V. Review on Appeal.

I. IN GENERAL.

Purpose of alimony pendente lite is to give a dependent spouse immediate support and allow her to maintain her action. Giving supporting spouse credit for equitable distribution purposes for various payments made as part of alimony pendente lite would defeat the purpose of alimony pendente lite by penalizing the dependent spouse in the final distribution of the marital assets. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408 (1988).

Cited in Holder v. Holder, 87 N.C. App. 578, 361 S.E.2d 891 (1987); Evans v. Evans, 111 N.C. App. 792, 434 S.E.2d 856 (1993).

II. PREREQUISITES.

Pleadings Held Insufficient. — Trial court did not err by finding wife's pleadings were insufficient on their face and dismissing her action for alimony and alimony pendente lite; plaintiff asserted in her complaint that she was a "dependent spouse," but the only support she offered for this conclusion was evidence of her husband's salary and she did not present any evidence that she needed assistance to subsist during the prosecution or defense of the suit. Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989), cert. denied, 326 N.C. 50, 389 S.E.2d 94 (1990).

Order for Temporary Alimony Held Error. — Trial court erred in ordering husband to pay wife temporary alimony and counsel fees retroactively from Dec. 21, 1987, the date of the entry of the order, to Aug. 1, 1984, approximately one month after the date the parties separated; wife's failure to claim alimony pendente lite and counsel fees at the time the parties separated demonstrated a total lack of need for an order of temporary alimony and counsel fees and the record vividly disclosed that wife was able to support herself and employ counsel to protect her interest during the pendency of the action. Haywood v. Haywood, 95 N.C. App. 426, 382 S.E.2d 798, cert. denied, 325 N.C. 706, 388 S.E.2d 454 (1989).

IV. AMOUNT.

Award Upheld. — Award of $400.00 per month for support and maintenance pendente lite upheld. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 321 N.C. 330, 368 S.E.2d 875 (1988).

V. REVIEW ON APPEAL.

Order denying alimony pendente lite and attorneys' fees is an interlocutory decree from which an immediate appeal does not lie. Wilson v. Wilson, 90 N.C. App. 144, 367 S.E.2d 363 (1988).

Denial of Attorneys' Fees Held Interlocutory. — Denial of attorneys' fees under § 50-16.4 was not a final order of the trial court, where at the time appellant's motion was filed there had been no determination that his client, defendant, was entitled to alimony pendente lite under this section, so that appellant was not yet entitled to attorneys' fees under § 50-16.4, and as appellant could appeal the denial of his motion after final judgment, or could bring a separate lawsuit to collect his fees, no substantial right of appellant was affected by the Court of Appeals' failure to entertain an interlocutory appeal on this issue. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

§ 50-16.4. Counsel fees in actions for alimony.

Legal Periodicals. —

For note, "A Public Goods Approach to Calculating Reasonable Fees under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

I. In General.
III. Findings.
IV. Review on Appeal.

I. IN GENERAL.

Spouse awarded alimony pendante lite does not lose her right to attorney's fees for services rendered in a pendente lite proceeding in the event the recipient's permanent alimony claim is denied. Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

Award of counsel fees is appropriate whenever it is shown. —

To recover attorneys' fees pursuant to this section in an action for alimony, the spouse must be entitled to the relief demanded, must be a dependent spouse, and must have insufficient means to subsist during the prosecution of the suit and to defray the expenses thereof. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

The requirements which a spouse must meet before a request for attorneys' fees pendente lite can be granted are as follows: (1) the party requesting the award must be a "dependent spouse" as defined in § 50-16.1(3); (2) the party must be entitled to alimony pendente lite; and (3) the court must find that the dependent spouse is without sufficient means to subsist during the prosecution or defense of the suit and to defray the attendant expenses thereof. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

"At anytime," etc. —

Anytime a dependent spouse can show grounds for alimony pendente lite under § 50-16.3, the court can award attorneys' fees; "anytime" includes time subsequent to the determination of the issues in the dependent spouse's favor at the trial of his or her cause on the merits. Evans v. Evans, 111 N.C. App. 792, 434 S.E.2d 856, cert. denied, 335 N.C. 554, 439 S.E.2d 144 (1993).

Award Held Improper. —

Trial court erred in awarding attorneys' fees to wife, where the evidence showed that she had assets of over $490,000, debts of $37,876, and a total gross monthly income of $1477 (plus $1684 in alimony), with monthly expenses of $2500, and that husband had assets of $901,338.29, debts of $338,095.46, a gross monthly income of $8696.32, and monthly living expenses of $2861.11. Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

III. FINDINGS.

Upon Which Determination of Reasonableness, etc. — An order awarding counsel fees in a child support or alimony action must contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered, the time and skill required, and the attorney's hourly rate in comparison to the customary charges of attorneys practicing in that general area. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 321 N.C. 330, 368 S.E.2d 875 (1988).

In Combined Actions Findings Should Not Reflect Fees Attributable to Equitable Distribution. — In a combined action for alimony, child support, and equitable distribution, findings should reflect that the fees awarded are attributable to work only on the alimony and/or child support actions. Holder v. Holder, 87 N.C. App. 578, 361 S.E.2d 891 (1987).

Recital that appellee's attorney rendered valuable services not sufficient to support court's conclusion that appellee is entitled to recover $2,500.00 in attorneys' fees. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408 (1988).

IV. REVIEW ON APPEAL.

Denial of Attorneys' Fees Held Interlocutory. — Denial of attorneys' fees under this section was not a final order of the trial court, where at the time appellant's motion was filed there had been no determination that his client, defendant, was entitled to alimony pendente lite under § 50-16.3, so that appellant was not yet entitled to attorneys' fees under this section, and as appellant could appeal the denial of his motion after final judgment, or could bring a separate lawsuit to collect fees, no substantial right of appellant was affected by the Court of Appeals' failure to entertain an interlocutory appeal on this issue. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

§ 50-16.5. Determination of amount of alimony.

Legal Periodicals. —

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

CASE NOTES

I. In General.
II. Basis of Award.
III. Discretion of Trial Court.

I. IN GENERAL.

Determination of Dependency under This Section and § 50-16.1. — Even where a spouse is not "actually substantially dependent," the spouse may be a dependent spouse under the second part of § 50-16.1(3) if he or she is substantially in need of maintenance and support, the meaning of which is determined by constructing § 50-16.1 in pari materia with this section. Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

Quoted in Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993).

II. BASIS OF AWARD.

To determine whether the dependent spouse was entitled to alimony and, if so, in what amount, the trial judge was required to weigh evidence of adultery by the supporting spouse as well as evidence of indignities offered by both the supporting and the dependent spouse. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

The term "estates" in subsection (a) refers to the financial worth of each spouse. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

Standard of Living Determinations. — Although the court did not make any detailed findings as to the couple's accustomed standard of living, where the findings which it made allowed the court to determine the couple's accustomed standard of living, a specific finding regarding the standard of living was not necessary. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408 (1988).

Judge's findings as to husband's monthly gross income and his reasonable living expenses, coupled with the findings as to wife's monthly income and her expenses during the last year of the marriage, satisfied the requirement of this section for findings regarding the couple's accustomed standard of living. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

Determination of Gross Income Was Proper. — There was no error where judge determined husband's monthly gross income from February 1986 through January 1987 by subtracting the expenses of husband's business from its deposits and dividing the sum by 12; the figures pertaining to deposits and expenses were furnished by husband's own testimony and by his own exhibits, and the judge also made a finding as to husband's indebtedness in areas unrelated to his business. Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988).

A conclusion of law that there has been a substantial change of circumstances based only on income is inadequate and in error. Self v. Self, 93 N.C. App. 323, 377 S.E.2d 800 (1989).

The trial court's failure to make any findings regarding plaintiff's reasonable current financial needs and expenses and the ratio of those needs and expenses to her income constituted error. Self v. Self, 93 N.C. App. 323, 377 S.E.2d 800 (1989).

Modifying Court May Make Independent and Additional Findings. — Modification of an alimony award requires consideration of this section's standards, but this mandate does not limit a modifying court to only those findings of fact made by the court which entered the original alimony order or that the modifying court cannot make additional and independent findings of fact under this section as to the parties' health and financial needs existing at the time of the original alimony order based on evidence presented at the modification hearing. Self v. Self, 93 N.C. App. 323, 377 S.E.2d 800 (1989).

Principal on equitable distribution note from husband to wife was properly included in calculating the assets owned by wife, rather than her monthly income. Lamb v. Lamb, 103 N.C. App. 541, 406 S.E.2d 622 (1991).

Pleading Held Insufficient. — Trial court did not err by finding wife's pleadings were insufficient on their face and dismissing her action for alimony and alimony pendente lite; plaintiff asserted in her complaint that she was a "dependent spouse," but the only support she offered for this conclusion was evidence of her husband's salary and she did not present any evidence that she needed assistance to subsist during the prosecution or defense of the suit. Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989), cert. denied, 326 N.C. 50, 389 S.E.2d 94 (1990).

III. DISCRETION OF TRIAL COURT.

Conclusion Not Disturbed on Appeal Where Supported, Despite Contradictions. — Although plaintiff's testimony on cross-examination tended to contradict her assertion that her illness was incapacitating, the trial court considered this evidence and concluded that the plaintiff's medical condition prevented her from undertaking any meaningful employment and that she was unable to work and earn income to defray her own expenses; this conclusion was supported by the testimony of the plaintiff, and despite contradictions, it would not be disturbed on appeal. Brandt v. Brandt, 92 N.C. App. 438, 374 S.E.2d 663 (1988), aff'd, 325 N.C. 429, 383 S.E.2d 656 (1989).

Failure to Make Adequate Findings. — Where trial court failed to make findings about the parties' estates and accustomed standard of living, the case was remanded for additional findings of fact regarding the award of alimony. Ellinwood v. Ellinwood, 94 N.C. App. 682, 381 S.E.2d 162 (1989).

§ 50-16.6. When alimony not payable.

Legal Periodicals. — For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

CASE NOTES

I. In General.
III. Separation Agreements.

I. IN GENERAL.

Cited in Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988).

III. SEPARATION AGREEMENTS.

Post-Separation Failure to Provide Necessary Subsistence. — Absent a valid separation agreement waiving all alimony rights under subsection (b) of this section, post-separation failure to provide a dependent-spouse with necessary subsistence gives rise to an action for alimony. Brown v. Brown, 104 N.C. App. 547, 410 S.E.2d 223 (1991), cert. denied, 331 N.C. 383, 417 S.E.2d 789 (1992).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.

CASE NOTES

I. In General.
II. Contempt.

I. IN GENERAL.

Trial court's creation of a trust consisting of certain real and personal property owned by the parties in order to secure the payment of alimony and child support was a proper exercise of its discretion in applying the provisions of § 50-13.4(e) and of subsections (a) and (c) of this section, and would be affirmed. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

Trial judge's authority to incorporate a deed of separation into a judgment does not depend on the validity of deed of separation. Wells v. Wells, 92 N.C. App. 226, 373 S.E.2d 879 (1988), cert. denied, 324 N.C. 342, 378 S.E.2d 810 (1989).

Divorce Actions Awarding Alimony Remain Open for Enforcement. — Divorce actions in which alimony is awarded are not ended merely by the rendition of judgment. Such actions are always open for motions in the cause for the enforcement of the order for alimony. Miller v. Miller, 98 N.C. App. 221, 390 S.E.2d 352 (1990), cert. denied, 327 N.C. App. 637, 399 S.E.2d 124 (1990).

Service of Notice of Motion for Enforcement on Defendant's Attorney. — Plaintiff seeking enforcement of an order for alimony need not serve defendant with a new summons. Simply serving him with notice of the motion for enforcement is sufficient. Unless otherwise ordered by the court, § 1A-1, Rule 5(b) allows service of notice of written motions by service on defendant's attorney of record. Miller v. Miller, 98 N.C. App. 221, 390 S.E.2d 352, cert. denied, 327 N.C. App. 637, 399 S.E.2d 124 (1990).

Service of defendant's attorney of record in divorce case in 1976 with copies of motion for assignment of wages and show cause order of 1988 was proper, despite defendant's contention that attorney was hired only to protect defendant's interest in the dissolution of his marriage in 1976. Miller v. Miller, 98 N.C. App. 221, 390 S.E.2d 352, cert. denied, 327 N.C. App. 637, 399 S.E.2d 124 (1990).

II. CONTEMPT.

Trial Court Has Jurisdiction to Enforce Alimony Order During Appeal. — Trial court did not lack authority to enter contempt order and initial show cause order against defendant where defendant had appealed original order for periodic alimony payments; appeal did not remove jurisdiction of trial court under § 1-294 since this section dictates that trial court has jurisdiction to enforce alimony order during appeal. Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

§ 50-16.8. Procedure in actions for alimony and alimony pendente lite.

(a) The procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions except as provided in this section and in G.S. 50-19.

(b) Payment of alimony may be ordered:

(1) Upon application of the dependent spouse in an action by such spouse for divorce, either absolute or from bed and board; or

(2) Upon application of the dependent spouse in a separate action instituted for the purpose of securing an order for alimony without divorce; or

(3) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, or a proceeding for alimony without divorce, instituted by the other spouse.

(c) A cross action for divorce, either absolute or from bed and board, shall be allowable in an action for alimony without divorce.

(d) Payment of alimony pendente lite may be ordered:

(1) Upon application of the dependent spouse in an action by such spouse for absolute divorce, divorce from bed and board, annulment, or for alimony without divorce; or

(2) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, annulment, or for alimony without divorce, instituted by the other spouse.

(e) No order for alimony pendente lite shall be made unless the supporting spouse shall have had five days' notice thereof; but if the supporting spouse shall have abandoned the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse, no notice is necessary.

(f) When an application is made for alimony pendente lite, the parties shall be heard orally, upon affidavit, verified pleading, or other proof, and the judge shall find the facts from the evidence so presented.

(g) When a district court having jurisdiction of the matter shall have been established, application for alimony pendente lite shall be made to such district court, and may be heard without a jury by a judge of said court at any time.

(h) In any case where a claim is made for alimony without divorce, when there is a minor child, the pleading shall set forth the name and age of each such child; and if there be no minor child, the pleading shall so state. (1871-2, c. 193, ss. 37, 38, 39; 1883, c. 67; Code, ss. 1290, 1291, 1292; Rev., ss. 1565, 1566, 1567; 1919, c. 24; C.S., ss. 1665, 1666, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3;

1953, c. 925; 1955, cc. 814, 1189; 1961, c. 80; 1967, c. 1152, s. 2; 1971, c. 1185, s. 25; 1979, c. 709, s. 4.)

Editor's Note. — The section above has been set out to correct a printing error.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

§ 50-16.9. Modification of order.

CASE NOTES

I. In General.
II. Change of Circumstances.
III. Separation Agreements, Consent Judgments, etc.
IV. Remarriage of Dependent Spouse.
V. Modification of Foreign Judgments and Modification by Foreign Courts.

I. IN GENERAL.

Modification of Alimony Improper Where Motion Only Sought Modification of Child Support. — Where, the only motion before the trial court was one for modification of child support, not alimony, and at no point in the proceedings did either party move for modification of the alimony payments, order modifying alimony agreement would be reversed. Van Nynatten v. Van Nynatten, 113 N.C. App. 142, 438 S.E.2d 417 (1993).

Modification Referable to Date Petition Filed. — Orders which modify alimony or support payments effective as of the date of the petition, or subsequent thereto, but prior to the date of the order of modification, are not subject to the criticism that they have retroactive effect which destroys vested rights. This is true because the modification and the whole proceeding in which it is made are referable to the date of the filing of the petition and any change effective as of that date cannot be said to be retroactive. Hill v. Hill, 335 N.C. 140, 435 S.E.2d 766 (1993).

Support Payments Not Part of Integrated Agreement. — The opinion in Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983) did not change the law in North Carolina that property settlement provisions of a separation agreement included in a consent decree are beyond the power of the judge to modify without the consent of both parties, nor did it change the law in North Carolina which prohibits the modification of support provisions of an integrated property settlement agreement; however, since support payments not part of an integrated agreement are modifiable by law, Walters would allow such support provisions to be modified if included in a court-ordered decree at the request of the parties. Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990).

Power to Modify Includes Power to Terminate Award. —

This power to modify includes the power to terminate alimony altogether. Self v. Self, 93 N.C. App. 323, 377 S.E.2d 800 (1989).

Survival of Lump Sum Award. — A lump sum alimony award that has vested prior to the dependent spouse's remarriage survives the remarriage. Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994).

Lump Sum's Failure to Vest. — Lump sum award did not vest prior to the defendant's remarriage where defendant was only entitled to semi-monthly payments and if plaintiff failed to make one of the payments, defendant could only execute on that amount. Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994).

The trial court's failure to make any findings regarding plaintiff's reasonable current financial needs and expenses and the ratio of those needs and expenses to her income constituted error. Self v. Self, 93 N.C. App. 323, 377 S.E.2d 800 (1989).

Evidentiary Hearing Required. — Where a separation agreement did not contain explicit, unequivocal provisions on integration or nonintegration, an evidentiary hearing was required to determine the intent of the parties regarding whether the agreement was separable or integrated. Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990).

For a case discussing modification of separation agreements prior to the decision in Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983), which was expressly made prospective only and applies to judgments entered on or after 11 January 1983, see Rogers v. Rogers, 111 N.C. App. 606, 432 S.E.2d 907 (1993).

II. CHANGE OF CIRCUMSTANCES.

Refusal to Reduce Alimony Upheld. — Where although plaintiff ex-wife, at time of hearing, made $22,788.00 per year, she had a debt of $20,000.00, much of which was attributable to defendant's failure to make past alimony payments, the trial court did not err in failing to reduce defendant ex-husband's alimony payments to her. Patton v. Patton, 88 N.C. App. 715, 364 S.E.2d 700 (1988).

Change of Circumstances Not Shown. — Findings of fact found by the trial court held supported by the evidence and clearly and more than amply supported the court's conclusion that defendant had failed to show a substantial change of circumstances that would warrant a modification of consent judgment providing for alimony and child support. Outlaw v. Outlaw, 89 N.C. App. 538, 366 S.E.2d 247 (1988).

III. SEPARATION AGREEMENTS, CONSENT JUDGMENTS, ETC.

The power of the court to enforce its judgment, etc. —

Once a separation agreement is incorporated into a court order, it loses its character as a contract and becomes a court order, which must then be enforced through the contempt powers of the court. Pitts v. Broyhill, 88 N.C. App. 651, 364 S.E.2d 738 (1988).

Right to Present Evidence on Issue of Separability. — On wife's motion for increase in alimony payments, where consent order entered into between husband and wife contained support provisions and property settlement provisions, an evidentiary hearing was required to determine the intent of the parties regarding whether the provisions of the agreement were separable or integrated, and it was error for the trial court to refuse to allow husband to present evidence on this issue. Lemons v. Lemons, 103 N.C. App. 492, 406 S.E.2d 8 (1991), decided under law in effect in 1978 at time of consent decree.

Surrender of Right to Enforce Agreement as Consideration for New Agreement. — Contractual surrender of plaintiff's right to bring an action to enforce portion of separation agreement which was incorporated in divorce decree was sufficient legal detriment to constitute consideration under a new agreement. Pitts v. Broyhill, 88 N.C. App. 651, 364 S.E.2d 738 (1988).

IV. REMARRIAGE OF DEPENDENT SPOUSE.

Obligation Ceases upon Remarriage of Dependent Spouse. —

Whether the alimony award is in the form of a "lump sum" or "periodic payments" is irrelevant since subsection (b) clearly provides that the supporting spouse's obligation to pay any alimony is terminated by the dependant spouse's remarriage and does not distinguish between the method of payment. Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994).

Obligation Held to Terminate. — Where in consent judgment incorporating parties' deed of separation and property settlement, $400.00 per month payment was twice denominated "alimony," while there was no reference whatsoever to the distribution of stock, vehicles, and other property, the $400.00 payment was alimony, and defendant's obligation to make such payments terminated upon plaintiff's remarriage in accordance with the mandate of subsection (b) of this section. Garner v. Garner, 88 N.C. App. 472, 363 S.E.2d 670 (1988).

V. MODIFICATION OF FOREIGN JUDGMENTS AND MODIFICATION BY FOREIGN COURTS.

North Carolina law applies prospectively from the date of registration under the Uniform Reciprocal Enforcement of Support Act, § 52A-1 et seq. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

But Not Retroactively. — Registration is a ministerial duty of the clerk, not exercising any power over the obligor's person or property. Such registration cannot lawfully transform foreign alimony orders that are modifiable as to past-due installments in the jurisdiction of rendition into North Carolina orders subject to North Carolina law retrospectively. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

Alimony orders registered pursuant to § 52A-26, et seq., retain, for their lifespan prior to registration, their foreign identity, and the laws of the foreign jurisdiction apply in any subsequent enforcement proceeding. This means that at any enforcement proceeding under § 52A-30 the obligor may apply, just as at a civil action instituted under subsection (c) of this section, for a new order modifying or superseding the foreign order "to the extent that it could have been so modified in the jurisdiction where granted." Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

An obligee may not strip an obligor of rights and defenses otherwise available by the simple expedient of litigating under Chapter 52A, the Uniform Reciprocal Enforcement of Support Act, rather than under subsection (c) of this section. Allsup v. Allsup, 88 N.C. App. 533, 363 S.E.2d 883, aff'd, 323 N.C. 603, 374 S.E.2d 237 (1988).

§ 50-16.11. Judgment that a supporting spouse is not liable for alimony.

CASE NOTES

Plain Meaning. — The plain and definite meaning of this section is that when a jury or trial judge finds that none of the grounds on which a spouse alleges entitlement to permanent alimony pursuant to § 50-15.2 exists, the trial court, in its discretion may order recoupment of any alimony pendente lite paid by the supporting spouse. Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

§ 50-18. Residence of military personnel; payment of defendant's travel expenses by plaintiff.

Legal Periodicals. — For comment, "Conflicts of Law in Divorce Litigation: A Looking-Glass World?", see 10 Campbell L. Rev. 145 (1987).

§ 50-19. Maintenance of certain actions as independent actions permissible.

(a) Notwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action for divorce under the provisions of G.S. 50-5.1 or G.S. 50-6 that is filed as an independent, separate action may be prosecuted during the pendency of an action for:

(1) Alimony;
(2) Alimony pendente lite;
(3) Custody and support of minor children;

(4) Custody and support of a person incapable of self-support upon reaching majority; or

(5) Divorce pursuant to G.S. 50-5.1 or G.S. 50-6.

(b) Notwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action described in subdivision (a)(1) through (a)(5) of this section that is filed as an independent, separate action may be prosecuted during the pendency of an action for divorce under G.S. 50-5.1 or G.S. 50-6.

(c) Repealed by Session Laws 1991, c. 569, s. 1, effective October 1, 1991. (1979, c. 709, s. 2; 1985, c. 689, s. 20; 1991, c. 569, s. 1.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, repealed subsection (c), which related to a divorce obtained by a supporting spouse affecting the rights of a dependent spouse with respect to an action for alimony or alimony pendente lite pending at the time of the divorce.

CASE NOTES

Quoted in Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110 (1987).

§ 50-20. Distribution by court of marital property upon divorce.

(a) Upon application of a party, the court shall determine what is the marital property and shall provide for an equitable distribution of the marital property between the parties in accordance with the provisions of this section.

(b) For purposes of this section:

(1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property in accordance with subdivision (2) of this subsection. Marital property includes all vested pension, retirement, and other deferred compensation rights, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act. It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence.

(2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate

property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property. The expectation of nonvested pension, retirement, or other deferred compensation rights shall be considered separate property.

(3) "Distributive award" means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.

The distributive award of vested pension, retirement, and other deferred compensation benefits may be made payable:

a. As a lump sum by agreement;
b. Over a period of time in fixed amounts by agreement;
c. As a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits; or
d. By awarding a larger portion of other assets to the party not receiving the benefits, and a smaller share of other assets to the party entitled to receive the benefits.

Notwithstanding the foregoing, the court shall not require the administrator of the fund or plan involved to make any payments until the party against whom the award is made actually begins to receive the benefits unless a plan under the Employee Retirement Income Security Act (ERISA) permits earlier distribution. The award shall be determined using the proportion of time the marriage existed, (up to the date of separation of the parties), simultaneously with the employment which earned the vested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. The award shall be based on the vested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and shall not include contributions, years of service or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation. No award shall exceed fifty percent (50%) of the benefits the person against whom the award is made is entitled to receive as vested pension, retirement, or other deferred compensation benefits, except that an award may exceed fifty percent (50%) if (i) other assets subject to equitable distribution are insufficient; or (ii) there is difficulty in distributing any asset or any interest in a business, corporation, or profession; or (iii) it is economically desirable for one party to retain an asset or interest that is intact and free from any claim or interference by the other party; or (iv) more than one pension or retirement system or deferred compensation plan or fund is involved, but the benefits awarded may not exceed fifty percent (50%) of the total benefits of all the plans added together; or (v) both parties consent. In no event shall an award exceed fifty percent (50%) if a plan prohibits an award in excess of fifty percent (50%).

In the event the person receiving the award dies, the unpaid balance, if any, of the award shall pass to the beneficiaries of the recipient by will, if any, or by intestate succession, or by beneficiary designation with the plan consistent with the terms of the plan unless the plan prohibits such a designation. In the event the person against whom the award is made dies, the award to the recipient shall remain payable to the extent permitted by the pension or retirement system or deferred compensation plan or fund involved.

The Court may require distribution of the award by means of a qualified domestic relations order, as defined in Section 414(p) of the Internal Revenue Code of 1986. To facilitate the calculation and payment of distributive awards, the administrator of the system, plan or fund may be ordered to certify the total contributions, years of service, and pension, retirement, or other deferred compensation benefits payable.

The provisions of this section and G.S. 50-21 shall apply to all pension, retirement, and other deferred compensation plans and funds, including military pensions eligible under the Federal Uniform Services Former Spouses Protection Act, and including funds administered by the State pursuant to Articles 84 through 88 of Chapter 58 and Chapters 120, 127A, 128, 135, 143, 143B, and 147 of the General Statutes, to the extent of a member's accrued benefit at the date of separation, as determined by the court.

(c) There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:

(1) The income, property, and liabilities of each party at the time the division of property is to become effective;
(2) Any obligation for support arising out of a prior marriage;
(3) The duration of the marriage and the age and physical and mental health of both parties;
(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
(5) The expectation of nonvested pension, retirement, or other deferred compensation rights, which is separate property;
(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;
(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;
(9) The liquid or nonliquid character of all marital property;

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;

(11) The tax consequences to each party;

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution; and

(12) Any other factor which the court finds to be just and proper.

(d) Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

(e) In any action in which the court determines that an equitable distribution of all or portions of the marital property in kind would be impractical, the court in lieu of such distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

(f) The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

(g) If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(h) If either party claims that any real property is marital property, that party may cause a notice of lis pendens to be recorded pursuant to Article 11 of Chapter 1 of the General Statutes. Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent, prior to the filing of the lis pendens, shall take the real property free of any claim resulting from the equitable distribution proceeding. The court may cancel the notice of lis pendens upon substitution of a bond with surety in an amount determined by the court to be sufficient provided the court finds that the claim of the spouse against property subject to the notice of lis pendens can be satisfied by money damages.

(i) Upon filing an action or motion in the cause requesting an equitable distribution or alleging that an equitable distribution will be requested when it is timely to do so, a party may seek injunctive relief pursuant to G.S. 1A-1, Rule 65 and Chapter 1, Article 37, to prevent the disappearance, waste or conversion of property alleged to be marital property or separate property of the party seeking relief. The court, in lieu of granting an injunction, may require a bond or other assurance of sufficient amount to protect the interest of the other spouse in the marital or separate property. Upon application by the owner of separate property which was removed from the marital home or possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and costs of court incurred to regain its possession, but such fees shall not exceed the fair market value of the separate property at the time it was removed.

(i1) After an action for equitable distribution has been filed the Court may, for just cause, order the spouse in control of marital assets to transfer the use and possession of some or all of those assets to the other spouse provided that any and all assets so transferred shall be subject to a full accounting when the property is ultimately allocated in an equitable distribution judgment. Any property transfer made pursuant to this subsection shall be made without prejudice to the rights of either spouse to claim a contrary classification, value, or distribution in the final equitable distribution trial.

(j) In any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property has been equitably divided.

(k) The rights of the parties to an equitable distribution of marital property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation. (1981, c. 815, s. 1; 1983, c. 309; c. 640, ss. 1, 2; c. 758, ss. 1-4; 1985, c. 31, ss. 1-3; c. 143; c. 660, ss. 1-3; 1987, c. 663; c. 844, s. 2; 1991, c. 635, ss. 1, 1.1; 1991 (Reg. Sess., 1992), c. 960, s. 1.)

Effect of Amendments. —

The 1991 amendment, effective October 1, 1991, and applicable to actions for equitable distribution pending or filed on or after that date, in subdivision (b)(1) substituted "subsection" for "section" at the end of the first sentence and added the last two sentences of that subdivision, and added subsection (i1).

The 1991 (Reg. Sess., 1992) amendment, effective October 1, 1992, and applicable to actions for equitable distribution pending or filed on or after that date, in subsection (b), in the third full paragraph of subdivision (3) added the language beginning "unless a plan under" in the first sentence, added the language beginning "except that an award may exceed" at the end of the next to last sentence, and added the last sentence, and added the language beginning "or by beneficiary designation" in the first sentence of the fourth paragraph.

Legal Periodicals. —

For 1987 note on equitable distribution law as it relates to personal injury awards in divorce actions, see 65 N.C.L. Rev. 1332 (1987).

For note on the continued prohibition of contingency fees in divorce actions, see 65 N.C.L. Rev. 1378 (1987).

For article, "The Equitable Distribution of Professional Degrees upon Divorce in North Carolina," see 10 Campbell L. Rev. 69 (1987).

For note relating to revocation of the marital presumption and adoption of the analytic approach to the classification of personal injury settlements, in light of Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986), see 22 Wake Forest L. Rev. 931 (1987).

For note on separation agreements, see 66 N.C.L. Rev. 1254 (1988).

For note on post-separation sexual intercourse precluding enforcement of agreement requiring parties to live separate and apart, see 11 Campbell L. Rev. 73 (1988).

For article, "Increases in Separate Property and the Evolving Marital Partnership," see 24 Wake Forest L. Rev. 239 (1989).

For note, "McLean v. McLean: North Carolina Adopts the Gift Presumption in Equitable Distribution," see 68 N.C. L. Rev. 1269 (1990).

For article, "Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina," see 69 N.C.L. Rev. 319 (1991).

For note, "Post-Separation Failure to Support a Dependent Spouse as a Sole Ground for Alimony Despite the Absence of Marital Misconduct Before Separation — Brown v. Brown," see 15 Campbell L. Rev. 333 (1993).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

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I. GENERAL CONSIDERATION.

Legislative Intent. —

The legislature did not intend the Equitable Distribution Act to apply solely to property acquired on or after the effective date of the act or its amendments. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Only married persons are afforded the protections of this statute; therefore, the Court of Appeals would not expand the legislature's clear definition of marital property to include property acquired prior to marriage. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

No Right to Jury Trial in Equitable Distribution Action. — No right to bring an action for equitable distribution of marital property existed prior to the adoption of the equitable distribution statutes, this section and § 50-21, and the language of the statutes themselves create no new right to trial by jury; therefore, there is no right to trial by jury for such an action under the Constitution of North Carolina. Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989).

For a case applying subsection (c) prior to its amendment, effective October 1, 1991, in upholding equitable distribution, see Munn v. Munn, 112 N.C. App. 151, 435 S.E.2d 74 (1993).

Jurisdiction Must Meet Minimum Contacts Standard. — In an equitable distribution action, the court is exercising jurisdiction over the interests of persons in property and not over a status of the parties. Exercise of this jurisdiction must meet the minimum contacts standard. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

Personalty in State Is Not Sufficient to Confer Jurisdiction. — The fact that there exists some personal property in North Carolina in which a nonresident defendant may have an interest because of the equitable distribution statute is not alone sufficient to establish jurisdiction over defendant or his property. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

Jurisdiction Not Shown. — Where defendant had not lived in North Carolina during any part of the parties' marriage, although certain property of the parties was located in North Carolina, and there was no indication of any action by defendant purposefully directed towards this state, the trial court lacked jurisdiction over defendant and his property for equitable distribution purposes and therefore could not properly determine the equitable distribution claim. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

Jurisdiction of Bankruptcy Court. — A claim for equitable distribution is a claim against property of the estate and therefore within the jurisdiction of the bankruptcy court. Perlow v. Perlow, 128 Bankr. 412 (E.D.N.C. 1991).

Right to Equitable Distribution Must Be Asserted Before Final Divorce. — Under § 50-11, a judgment of absolute divorce destroys the right to equitable distribution unless the right is asserted prior to judgment of absolute divorce. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Trial court erred in granting defendant wife's motion to be "relieved of the effect" of a divorce judgment solely to the extent that the judgment barred her claim for equitable distribution. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Claim to Property Was Not Notice of Equitable Distribution Claim. — In divorce case, defendant's answer asserting a claim to an interest in a specific piece of property, or to proceeds in plaintiff's possession flowing from defendant's interest in that piece of property, was not sufficient to put plaintiff on notice that he was asserting a claim for equitable distribution under this section. Goodwin v. Zeydel, 96 N.C. App. 670, 387 S.E.2d 57 (1990).

Actions for Breach of Fiduciary Duty, Unjust Enrichment, and Marital Destruction Are Not Maintainable Against Former Spouse. — A spouse or former spouse may not maintain actions against the other spouse for breach of fiduciary duty, unjust enrichment, and intentional marital destruction, all pertaining to the marital relationship and its dissolution either in an equitable distribution proceeding, or other proceedings. Smith v. Smith, 113 N.C. App. 410, 438 S.E.2d 457 (1994).

Power of Court Upon Finding of Contempt. — Upon a finding of contempt, in situations where original order requires transfer of property (including intangible property such as that represented by stock certificates), the trial court has authority to order contemnor to transfer said property as a condition of purging contempt, but does not have authority to require contemnor to pay compensatory damages incurred as a result of his noncompliance with original order. Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990).

Applied in Hill v. Hill, 94 N.C. App. 474, 380 S.E.2d 540 (1989); Swilling v. Swilling, 99 N.C. App. 551, 393 S.E.2d 303 (1990); Christensen v. Christensen, 107 N.C. App. 431, 420 S.E.2d 469 (1992); Albritton v. Albritton, 109 N.C. App. 36, 426 S.E.2d 80 (1993); Wilkins v. Wilkins, 111 N.C. App. 541, 432 S.E.2d 891 (1993).

Quoted in Halverson v. Halverson, 151 Bankr. 358 (M.D.N.C. 1993).

Stated in Broome v. Broome, 112 N.C. App. 823, 436 S.E.2d 918 (1993).

Cited in Collar v. Collar, 86 N.C. App. 109, 356 S.E.2d 405 (1987); Lefler v. Lefler, 91 N.C. App. 286, 371 S.E.2d 287 (1988); Lee v. Lee, 93 N.C. App. 504, 378 S.E.2d 554 (1989); Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989); Lowry v. Lowry, 99 N.C. App. 246, 393 S.E.2d 141 (1990); Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990); State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991); Lemons v. Lemons, 103 N.C. App. 492, 406 S.E.2d 8 (1991); Smith v. Smith, 104 N.C. App. 788, 411 S.E.2d 197 (1991); Topper v. Topper, 105 N.C. App. 239, 412 S.E.2d 173 (1992); Sonek v. Sonek, 105 N.C. App. 247, 412 S.E.2d 917 (1992); Gilbert v. Gilbert, 111 N.C. App. 233, 431 S.E.2d 805 (1993); King v. King, 112 N.C. App. 92, 434 S.E.2d 669 (1993); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993); King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994).

II. MARITAL AND SEPARATE PROPERTY.

A. In General.

Dual Nature of Property Shown. — Defendant's interest in financial corporation was of a dual nature, having both a marital property and a separate property component. Smith v. Smith, 111 N.C. App. 460, 433 S.E.2d 196, petition denied as to additional issues, 335 N.C. 177, 438 S.E.2d 202 (1993).

Three-Step Analysis of Equitable Distribution. — A trial judge is required to conduct a three-step analysis when making an equitable distribution of the marital assets. These steps are: (1) To determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

The requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) consider the separate property in making a distribution of the marital property, and (3) distribute the marital property necessarily exist only when evidence is presented to the trial court which supports the claimed classification, valuation and distribution. Miller

v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

There may be both marital and separate ownership interests in the same property. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

"Source of Funds" Rule as to When Property is Acquired. —

The courts have adopted a source of funds approach to distinguish marital and separate contributions to a single asset. Under the source of funds approach, each party retains as separate property the amount he contributed to purchase the property plus passive appreciation in value. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

In applying the source of funds rule, the financial or other contributions by the marital and separate estates toward the acquisition of property must be identified and accounted for. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

The trial court erred in using a source of funds approach to determine what portion of a tract of land was marital property as opposed to separate property; the source of funds analysis is not applicable until the donor spouse has rebutted the gift presumption by clear, cogent and convincing evidence. Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

"Source of Funds" Rule Is Applicable Even When Property Is Converted After Separation. — In accord with the main volume. See Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

Only after determining the nature of the asset received by one spouse after separation, yet claimed by the other to be "marital property," may a classification be made of that asset as between "marital" or "separate" property. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

Premarital Contributions. — Premarital contributions are relevant in an equitable distribution proceeding, to the extent those contributions constitute separate property, entitling the contributing spouse to credit when property of mixed marital and separate character is distributed. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

For the purpose of classification of property, the marital estate is frozen as of the date of separation. While its components clearly may increase in value after separation and before distribution, no new property may be added to the marital estate after the date of separation. Becker v. Becker, 88 N.C. App. 606, 364 S.E.2d 175 (1988).

Debt, as well as assets, must be classified as marital or separate property; if the debt is classified as marital, the court must value the debt and distribute it pursuant to subsection (c). Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987); Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

Debt incurred after the separation of the parties was not subject to equitable distribution. Harrington v. Harrington, 110 N.C. App. 782, 431 S.E.2d 240 (1993).

The burden of proof is on the party seeking to classify a debt as marital. If the debt is classified as separate, the court must value it and then, pursuant to subdivision (c)(1), consider it in making a distribution. Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

Classification of Increases in Value to Separate Property — Burden of Proof. — Plaintiff, as the party claiming the increases in value to separate property to be marital, had the burden of showing by the preponderance of the evidence that the increases in value were marital property. Plaintiff met her burden by showing that all the increases in value were acquired by either or both spouses, were acquired during the course of the marriage, were acquired before the date of separation, and were presently owned. Accordingly, the burden shifted to the defendant to show by the preponderance of the evidence that the acquired increases in value to the properties were his separate property. Ciobanu v. Ciobanu, 104 N.C. App. 461, 409 S.E.2d 749 (1991).

If the party claiming the property to be separate and the party claiming the property to be marital both meet their burdens, then under the statutory scheme of N.C.G.S. subdivisions (b)(1) and (2) of this section, the property is excepted from the definition of marital property and is, therefore, separate property. This allocation of the burdens of proof is consistent with the General Assembly's recent amendment to subsection (b)(1) establishing a rebuttable presumption that property acquired between the dates of marriage and separation is marital property. Ciobanu v. Ciobanu, 104 N.C. App. 461, 409 S.E.2d 749 (1991).

Presumption of gift of property to which title is taken by the entirety is limited to real property acquired by both spouses, as tenants by the entirety, in exchange for the separate property of one of them. The presumption does not extend to jointly held personal property which is acquired in exchange for the separate property of one spouse, as to do so would seem to defeat the legislative intent of subdivision (b)(2) of this section. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Findings Required as to Debts Incurred During Marriage. — Where trial court failed to make adequate findings regarding the actual use of proceeds from a debt husband and wife incurred jointly, the findings were inadequate to determine whether the debt was marital or separate property; therefore, the case was remanded for further factual findings on the issue. Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

Effect of Dissolution of Tenancy by Entirety. — Although conveyances from wife to husband dissolved tenancy by the entirety in the parcels of land and vested title thereto solely in the husband, as provided by § 39-13.3(c), husband nevertheless acquired title to the property thereunder, not by gift, but during the course of the marriage and before the parties separated, and property so acquired is ipso facto marital property. Thus, contrary to the husband's contention, dissolving of the tenancy by entirety did not remove the property involved from the ambit of the Equitable Distribution Act, and the trial judge did not err in finding and concluding otherwise. Beroth v. Beroth, 87 N.C. App. 93, 359 S.E.2d 512, cert. denied, 321 N.C. 296, 362 S.E.2d 778 (1987), overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Fact that both names were on note, standing alone, was not sufficient to show an intent to make a gift to the marital estate. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Property Acquired While Parties Cohabited Out-of-Wedlock. — It was error for the trial judge to classify as marital property any interest in property acquired before the parties were married but while they lived together. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Property Purchased in Anticipation of Marriage. — The sole fact that property was purchased in anticipation of marriage is not, in and of itself, sufficient to establish donative intent. Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988).

Term "acquired" has a dynamic meaning, thus adopting the source of funds theory which recognizes that because property is acquired over time, it may have a dual nature and must therefore be designated according to whether the funds used for acquisition were marital or separate. Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988).

Property Acquired During Marriage Prior to Effective Date of Equitable Distribution. — The fact that husband acquired property during marriage but prior to the effective date of the Equitable Distribution Act does not mean that he also acquired a vested right in the law governing the disposition of property upon divorce which was in effect either at the time the property was acquired or at the time of his marriage. There is no such thing as a vested right in the continuation of an existing law. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Classification of property must be supported by the evidence and by appropriate findings of fact. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Availability of Equitable Remedies Does Not Affect Classification of Property. — The potential availability of equitable remedies—such as constructive trust, resulting trust, recovery in quantum meruit or quasi-contract—does not transform property acquired before marriage into marital property subject to equitable distribution under this section. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Awards or settlements arising from a personal injury claim, etc. —

Any part of an award compensating a non-injured spouse for loss of consortium is the separate property of the non-injured spouse. Lilly v. Lilly, 107 N.C. App. 484, 420 S.E.2d 492 (1992).

Although, based on his evidence, husband technically met his burden of proving that insurance proceeds from wife's personal injury settlement were marital property, the characterization of a spouse's personal injury settlement as marital or separate property depends on what the award was intended to replace. Lilly v. Lilly, 107 N.C. App. 484, 420 S.E.2d 492 (1992).

To the extent that an award replaces medical expenses, lost wages, or loss of earning capacity sustained during the marriage, it is marital property subject to equitable distribution. To the extent that the award replaces such economic loss occurring after separation, it is the separate property of the injured spouse. However, if the party claiming that the award is marital, i.e., the noninjured spouse, shows by a preponderance of the evidence that the award was acquired by the injured spouse during the marriage and before separation, then the entire award will be marital property unless the other party proves by a preponderance that the award, or some portion of it, was to compensate for economic loss occurring after the date of separation and is therefore separate property. Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

Wife was entitled to a claim against one-half of any monies which represented reimbursement for husband's lost wages prior to the parties' separation and those reimbursing him for medical expenses incurred prior to separation. Taylor v. Taylor, 92 N.C. App. 413, 374 S.E.2d 644 (1988).

Workers' compensation awards are classified as either marital or separate property depending on what the award was intended to replace. Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

The trial court erred in determining that the plaintiff converted certain marital funds to her own use during the marriage and in treating the allegedly converted funds as part of the marital estate in making its equitable distribution order, as defendant did not prove that any of this money was used to purchase assets that were owned by either of the parties on the date of separation. Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

Court to Determine What Is Marital Property. — Subsection (a) of this section makes it incumbent upon the court to determine what is marital property. Thomas v. Thomas, 102 N.C. App. 127, 401 S.E.2d 367 (1991).

"Use and Possession" of Marital Asset. — It is plain on the face of this section that the provision for transfer of "the use and possession" of a marital asset contemplates the transfer of an asset in kind; transferring the "use and possession" means that the spouse receiving the transfer is entitled to hold the asset pending a final equitable distribution award and use it as it was meant to be used. Brown v. Brown, 112 N.C. App. 15, 434 S.E.2d 873 (1993).

B. Marital Property Generally.

This section mandates a complete listing of marital property. —

In accord with first paragraph in the main volume. See Cornelius v. Cornelius, 87 N.C. App. 269, 360 S.E.2d 703 (1987).

"Vested" as Used in Subdivision (b)(1). — Vesting occurs when an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future. Milam v. Milam, 92 N.C. App. 105, 373 S.E.2d 459 (1988), cert. denied, 324 N.C. 247, 377 S.E.2d 755 (1989).

Assets to Be Classified According to Proof. —

Where plaintiff failed to meet his burden of proving that liability was marital, he could not later claim error in the trial court's classification of the debt. Tucker v. Miller, 113 N.C. App. 785, 440 S.E.2d 315 (1994).

Separate Property Not "Transmuted" into Marital Property. — Insurance settlement, originally the separate property of wife, was not transmuted into marital property as a result of wife's having deposited it into the parties' joint checking account. Lilly v. Lilly, 107 N.C. App. 484, 420 S.E.2d 492 (1992).

Presumption May Be Overcome, etc. —

In accord with second paragraph in the main volume. See McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

In order for property to be considered marital property it must be acquired before date of separation and must be owned at date of separation. Foster v. Foster, 90 N.C. App. 265, 368 S.E.2d 26 (1988), cert. denied, 324 N.C. 245, 376 S.E.2d 739 (1989).

Marital property is valued as of the date of the parties' separation. This valuation date is used to determine the equitable distributive share of each party. However, where there is evidence of active or passive appreciation of the marital assets after that date, the court must consider such appreciation as a factor under subdivision (c)(11a) or (12), respectively. Mishler v. Mishler, 90 N.C. App. 72, 367 S.E.2d 385, cert. denied, 323 N.C. 174, 373 S.E.2d 111 (1988).

Increase in Value of Separate Property Due to Active Appreciation Is Marital Property. —

Active appreciation of the value of separate property due to contributions of either spouse during marriage is nonetheless marital property, and therefore, is subject to equitable distribution. Rogers v. Rogers, 90 N.C. App. 408, 368 S.E.2d 412, cert. denied, 323 N.C. 366, 373 S.E.2d 548 (1988).

When a spouse uses separate property in the acquisition of property titled by the entireties, a gift to the marital estate is presumed; this presumption is rebuttable only by clear, cogent and convincing evidence that a gift was not intended. McLean v. McLean, 323 N.C. 543, 374 S.E.2d 376 (1988).

Bonus Payments. — A bonus based upon work performed during the marriage is not necessarily marital property. The bonus must also be vested. Edwards v. Edwards, 110 N.C. App. 1, 428 S.E.2d 834, cert. denied, 335 N.C. 172, 436 S.E.2d 374 (1993).

Vested Stock Options. — Stock options granted an employee by his or her employer which are exercisable upon the date of separation or which may not be cancelled, and which may, therefore, be said to be vested as of the date of separation, are marital property. Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

With regard to failure of trial court to equally divide the marital debts, subdivision (c)(11a) was not controlling where the payment of the marital debts in question was ordered as a part of the award of alimony pendente lite. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408 (1988).

Active Appreciation in Nonowned Real Property. — Where marital funds were expended to make improvements upon the couple's nonowned dwelling, the improvements were an asset acquired by the parties during marriage; consequently, plaintiff was entitled to an equitable share in the insurance proceeds realized upon destruction of the premises. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

Improvements on Nonowned Property. — Parties had a marital property interest in premises owned by defendant's parents arising from the improvements in the property accomplished by the parties during their marriage. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

Taxes on Maritally Owned Property. — A debt incurred during marriage for the joint benefit of husband and wife is a marital debt, and taxes on maritally owned property is such a debt. Bowman v. Bowman, 96 N.C. App. 253, 385 S.E.2d 155 (1989).

The trial court properly classified the parties' residence as marital property, where the parties' residence was titled in their names as entireties property, and the defendant did not come forward with clear, cogent, and convincing evidence to rebut the presumption created by the property being titled as entireties property. Thompson v. Thompson, 93 N.C. App. 229, 377 S.E.2d 767 (1989).

Since in an equitable distribution proceeding, only marital property is subject to distribution by the court, the trial court was without authority to appoint the spouses as trustees of an educational fund belonging to the parties' two children; further, the condition that the funds would be distributed to the children only after they complete four years of college is a creation of the court and one for which the trial court had no authority. Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

Leased Car. — The trial court did not err in failing to classify, value, and distribute a leased Porsche as a marital asset, where after the separation date, defendant returned the car to the leasing company and received no money in return because he had no equity in it. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Goodwill of Corporation. — The trial court erred in concluding that the goodwill of the corporation was an asset unique to plaintiff and in finding 100% of the goodwill to be a marital asset. Using the uncontested value of the goodwill, the trial court should include that value as part of the valuation of the corporation, calculate the portion of the corporation that is marital at 80%, and distribute accordingly. Tucker v. Miller, 113 N.C. App. 785, 440 S.E.2d 315 (1994).

Post-separation appreciation of a marital asset is not marital property and therefore cannot be distributed by the trial court. Such appreciation is a distributional factor which the court must consider in resolving what division of the marital property would be equitable. Fox v. Fox, 114 N.C. App. 125, 441 S.E.2d 613 (1994).

A marital debt is one incurred, during the marriage and before the date of separation, by either or both spouses for the joint benefit of the parties. Huguelet v. Huguelet, 113 N.C. App. 533, 439 S.E.2d 208 (1994).

Any debt incurred by one or both of the spouses after the date of separation to pay off a marital debt which exists on the date of separation is properly classified as a marital debt. Huguelet v. Huguelet, 113 N.C. App. 533, 439 S.E.2d 208 (1994).

Separate debt cannot be distributed; however, the trial court should consider such debt as a factor in deciding what constitutes an equitable division of the marital property. Fox v. Fox, 114 N.C. App. 125, 441 S.E.2d 613 (1994).

C. Separate Property Generally.

There is no requirement that spouse who owns separate property declare the intention that the property remain separate, or that the property for which separate property is exchanged be separate. Lewis v. Lewis, 98 N.C. App. 138, 389 S.E.2d 638, cert. denied, 327 N.C. App. 637, 399 S.E.2d 124 (1990).

Separate property remains separate property when it is exchanged for other separate property unless the conveyance states a contrary intention. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Wife's Contribution to Husband's Separate Property. — Fact that wife's contributions to husband's separate property, a beach condominium, consisted of those functions which a homemaker performs did not disentitle her from having the appreciation in the property's value classified as marital property. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Courts have consistently recognized the interest acquired by the nontitled spouse in separately-owned property which increases in value due to the personal efforts of the nontitled spouse. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

There is no rule of law which even intimates that a nontitled spouse should be penalized and not allowed a return on his or her investment because the efforts expended were characteristic of those which a caring and loving spouse would have performed in any event. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Where Mortgage Payments Made After, etc. —

Despite fact that the plaintiff and the defendant shared custody of the children by alternating their presence in the marital home during the couple's separation, the court erred in failing to credit plaintiff with paying the entire mortgage debt on the marital property as of the date of separation. Hendricks v. Hendricks, 96 N.C. App. 462, 386 S.E.2d 84 (1989), cert. denied, 326 N.C. 264, 389 S.E.2d 113 (1990).

The entireties conveyance itself sufficiently indicated the "contrary intention" under this section to preserving separate property. Thompson v. Thompson, 93 N.C. App. 229, 377 S.E.2d 767 (1989).

Separate Property Exchanged for Property Owned as Tenants by the Entireties. — Husband was presumed to have made gift of separate property to marital estate where separate property was exchanged for residential lot which was owned by parties as tenants by the entireties without reservation of interest. Haywood v. Haywood, 106 N.C. App. 91, 415 S.E.2d 565, cert. denied, 331 N.C. 553, 418 S.E.2d 665 (1992), cert. denied, 331 N.C. 553, 418 S.E.2d 666 (1992).

House Bought with Proceeds of Separate Property. — The proceeds from the subsequent sale during marriage of a boat which husband had built before the marriage belonged to him, as the source of those funds, the boat, was his; when the monies were then used to construct husband's and wife's house, the house became the separate property of the husband, absent evidence that the home was taken by the entireties, or that husband made a gift of the house to his wife. Lewis v. Lewis, 98 N.C. App. 138, 389 S.E.2d 638, cert. denied, 327 N.C. App. 637, 399 S.E.2d 124 (1990).

Storage of Separate Property in Joint Safety Deposit Box. — Gold coins that were acquired in exchange for the plaintiff's separate property were the plaintiff's separate property. That the plaintiff stored the coins in a joint safety deposit box was not an express contrary intention in the conveyance that the coins be considered to be marital property. Haywood v. Haywood, 106 N.C. App. 91, 415 S.E.2d 565, cert. denied, 331 N.C. 553, 418 S.E.2d 665 (1992), cert. denied, 331 N.C. 553, 418 S.E.2d 666 (1992).

Where a $17,000 BMW was paid with $10,000 given to the husband by his grandmother and deposited by him in a joint bank account, and there was no evidence of any donative intent, absent the deposit, $10,000 of the BMW purchase price should be considered the husband's separate property. Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988).

Where an automobile was purchased prior to marriage with a $7,000 down payment by husband, and was titled to both husband and wife, and they both made payments out of separate funds before marriage, and wife continued to make payments during separation, the automobile should not have been included as marital property in divorce proceedings but instead should have been apportioned pro rata to each estate (husband's separate, wife's separate, and marital). Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988).

Nonvested Stock Options. — Stock options granted to an employee by his or her employer which are not exercisable as of the date of separation and which may be lost as a result of events occurring thereafter are not vested, and should be treated as the separate property of the spouse for whom they may, depending upon circumstances, vest at some time in the future. Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

Money in Separate Account. — In divorce proceeding, where defendant argued that because her father gave money to her, and she deposited it in an account which was solely in her name, that the account should be classified as her separate property, however, the only evidence which was presented indicating donative intent as to this gift was defendant's testimony that "well, my daddy wants me to have this and I'm going to keep it separate," defendant did not meet the burden of showing by a preponderance of the evidence that the account met the definition of separate property. Johnson v. Johnson, 114 N.C. App. 589, 442 S.E.2d 533 (1994).

D. Professional and Business Licenses.

Criteria for valuation of a professional association set out in Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985), are factors for the court to consider in valuing a professional interest, and are not criteria for admissibility of the expert's opinion. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Goodwill is an asset which must be valued, etc. —

Trial court's recognition of the existence of corporation's goodwill, but failure to determine its value, was error. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

Method of Valuation. —

Factors listed in Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985), as relevant in valuing goodwill, namely, age, health, reputation of the practitioner, nature of the practice, length of time in existence, profitability, and comparative professional success, are helpful, though not exclusive or absolute. McLean v. McLean, 323 N.C. 543, 374 S.E.2d 376 (1988).

Value of Spouse's Law Practice. — On remand to determine the value of spouse's law practice, the trial court was directed to consider the following components of the association as enumerated in Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, cert. denied, 314 N.C. 543, 335 S.E.2d 316 (1985): (a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities. McLean v. McLean, 323 N.C. 543, 374 S.E.2d 376 (1988).

E. Pension and Retirement Benefits.

The 1987 amendment did not change the portion of the section permitting retirement benefits to be made payable "[a]s a prorated portion of benefits." In both versions of the section, the award is based on the benefits vested at the time of separation and must include any "growth" or "gains and losses" arising out of the vested benefits. Neither version permits an award based on contributions after the date of separation. Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992).

In the absence of an agreement of the parties, there are two methods for dividing retirement benefits: (1) award the pension to the employee-spouse and award other marital property of offsetting value to the other spouse under subdivision (b)(3)d, or (2) of this section divide the pension benefits if and when paid, under subdivision (b)(3)c of this section. The first method is known as the present value method, or the immediate offset method, while the second method is known as the fixed percentage method, or the deferred distribution method. Bishop v. Bishop, 113 N.C. App. 725, 440 S.E.2d 591 (1994).

Disability payments must be classified as the retiree's separate property and, as such, treated as a distributional factor. Bishop v. Bishop, 113 N.C. App. 725, 440 S.E.2d 591 (1994).

The increased component of a retirement annuity, offered to a spouse only after separation and for which the spouse was not eligible without additional service after the date of separation, is separate property for purposes of equitable distribution, since the increase vested only after the date of separation, and since the incentive increase in pension benefits was compensation for the loss of future earnings. Boger v. Boger, 103 N.C. App. 340, 405 S.E.2d 591 (1991).

Gains on Retirement Benefits After Separation. — The trial court did not err by failing to account for and distribute gains which accrued on the parties' retirement benefits after the date of separation. Harvey v. Harvey, 112 N.C. App. 788, 437 S.E.2d 397 (1993).

Division of Retirement Pay Upheld. —

Trial court properly awarded nonemployee spouse joint and survivor annuity benefits and pre-retirement benefits. Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992).

Calculation of Pension Value. — Under subsection (b)(3) the value of defendant's pension must be calculated as of the date of separation and years of service after the date of separation are not to be included in the valuation. Surrette v. Surrette, 114 N.C. App. 368, 442 S.E.2d 123 (1994).

Fifty-percent Cap under Fixed Percentage Formula. — Use of the fixed percentage formula prohibits nonemployee spouse from receiving more than 50% of the retirement benefits. Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992).

Benefits of amended pension plan which listed the vesting date prior to the date of separation were properly classified as marital property, and the court was also correct in valuing the pension at its net value, by subtracting the taxes which defendant had paid thereon. Mishler v. Mishler, 90 N.C. App. 72, 367 S.E.2d 385, cert. denied, 323 N.C. 174, 373 S.E.2d 111 (1988).

Social Security Retirement Benefits Cannot Be Disbursed In Equitable Distribution Award. — Where at separation husband had received monthly Social Security retirement benefits of six hundred seventy-nine dollars ($679.00) and trial court awarded wife four-ninths of husband's Social Security, trial court erred in its award of Social Security benefits to wife since Social Security benefits cannot be disbursed in equitable distribution award. Cruise v. Cruise, 92 N.C. App. 586, 374 S.E.2d 882 (1989).

Court improperly used the withdrawal value of a pension plan as valuation method where the pension plan did not allow early withdrawal of accumulated monies. Stiller v. Stiller, 98 N.C. App. 80, 389 S.E.2d 619 (1990).

The trial court erred by failing to classify a husband's retirement account as either marital or separate property where the husband's partnership agreement provided for vesting and both the husband's and the wife's experts testified about the value of the retirement interest. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

III. DISTRIBUTION OF PROPERTY.

A. In General.

Only Marital Property Distributed. — Under subsection (c), only marital property is subject to distribution. Rogers v. Rogers, 90 N.C. App. 408, 368 S.E.2d 412, cert. denied, 323 N.C. 366, 373 S.E.2d 548 (1988).

And Equal Division Is Mandatory, etc. —

In accord with the main volume. See Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

Equal division of marital property is mandatory unless the trial court determines that equal is not equitable. Coleman v. Coleman, 89 N.C. App. 107, 365 S.E.2d 178 (1988).

Equal division of the marital property mandatory, unless the court determines in the exercise of its discretion that such a distribution is inequitable. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

The trial court did not abuse its discretion in ordering an unequal division of the marital property in favor of the defendant where the trial court concluded that because the defendant had physical custody of the two minor children born of the marriage she had a need to occupy the marital residence and because the plaintiff had an income approximately twice the defendant's income an unequal division in favor of the defendant was equitable. Barlowe v. Barlowe, 113 N.C. App. 797, 440 S.E.2d 279 (1994).

When evidence is presented from which a reasonable finder of fact could determine that an equal division would be inequitable, the trial court is required to consider the factors set forth in subsection (c), but guided always by the public policy expressed in the act favoring an equal division. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Burden of Proving, etc. —

The burden is on the party seeking an unequal division of marital assets to prove by a preponderance of the evidence that an equal division is not equitable. Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

Failure in Burden to Present Evidence. — Where the party claiming a debt to be marital has failed in his burden to present evidence from which the trial court can classify, value and distribute the property, that party cannot on appeal claim error when the trial court fails to classify the property as marital and distribute it. Miller v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

Trial Judge Must Consider Distributional Factors. — Where the trial court's valuation of the marital home on the date of separation, the trial judge did not properly consider the post-separation appreciation as a distributional factor under subdivision (c)(11a) or (12). The trial judge must consider those distributional factors raised by the evidence of post-separation appreciation under subdivisions (c)(11a) and (12). Truesdale v. Truesdale, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

If a court divided the property equally after referring to this section and considering the factors and evidence, any improper reliance upon the statute could only result in harmless error, as the property was in fact divided equally. Eubanks v. Eubanks, 109 N.C. App. 127, 425 S.E.2d 742 (1993).

Pleadings. — Since there is no specific requirement in this section regarding the correct manner in which to plead a claim for equitable distribution, where defendant joined in plaintiff's prayer for equitable distribution in his answer, the defendant's answer was, in effect, a counterclaim. Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991).

Equitable distribution judgment held incomplete and erroneous in several respects, i.e., failure to identify, classify, value and distribute various bank accounts and household property, failure to find net value of marital estate, failure to make findings pursuant to subsection (c) of this section, failure to properly divide and distribute three tracts of marital real estate, and failure to make conclusions of law. Carr v. Carr, 92 N.C. App. 378, 374 S.E.2d 426 (1988).

Post-Separation Rental Income. — Rental income received from marital property between the date of separation and the date of the equitable distribution action may not be added to the marital estate. Rather than distributing the sums representing the income received from marital property, the trial court must consider the existence of this income, determine to whose benefit the income has accrued, and then consider that benefit when determining whether an equal or unequal distribution of the marital estate would be equitable. Chandler v. Chandler, 108 N.C. App. 66, 422 S.E.2d 587 (1992).

Award of Rental Value of Marital Residence for Post Separation Period. — Trial court did not err in denying the application by the defendant for judgment against the plaintiff for one-half of the fair rental value of the residence of the parties from the time of the separation of the parties through the date of the hearing. Black v. Black, 94 N.C. App. 220, 379 S.E.2d 879 (1989).

Post-Separation Appreciation of a Marital Asset Cannot Be Distributed. — Post-separation appreciation of a marital asset, whether passive appreciation or appreciation due to the efforts of an individual spouse, is not marital property and cannot be distributed by the trial court. Gum v. Gum, 107 N.C. App. 734, 421 S.E.2d 788 (1992).

But Should Be Considered as a Distributional Factor. — An increase in the value of a marital asset which occurs after separation of the parties but before the date of the equitable distribution trial should be considered pursuant to subdivisions (c)(11a) or (c)(12) as a distributional factor by the court in its determination of what constitutes an equitable distribution of the marital estate. Chandler v. Chandler, 108 N.C. App. 66, 422 S.E.2d 587 (1992).

Failure to File For Equitable Distribution Because of Misrepresentation. — If plaintiff did not file a claim for equitable distribution before the entry of the divorce judgment due to misrepresentations made by defendant, the trial court is not barred from making an equitable distribution. Where defendant's misrepresentation caused the plaintiff to forego pleading for equitable distribution prior to divorce, the defendant shall be equitably estopped from pleading § 50-11(e) as a bar to plaintiff's claim for an equitable distribution of the marital property. Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990), discretionary review denied, 328 N.C. 330, 402 S.E.2d 833 (1991).

Death Subsequent to Cláim for Equitable Distribution. — Ex-wife's death, which came subsequent to her divorce from plaintiff and which followed the institution of the claim for equitable distribution, did not abate her estate's action for equitable distribution. Tucker v. Miller, 113 N.C. App. 785, 440 S.E.2d 315 (1994).

Voluntary Dismissal of Claim. — Where at the time the plaintiff filed his voluntary dismissal of his claim for equitable distribution, the defendant had filed no pleadings, plaintiff was free to enter his voluntary dismissal of his equitable distribution claim without any notice to the defendant or the defendant's consent. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Credit Not Allowed. — Defendant was not entitled to a credit for debts incurred by defendant for paying a house cleaning bill, grocery bills, a clothing bill, a telephone bill, dry cleaning bills, etc., which debts were incurred after separation. Edwards v. Edwards, 110 N.C. App. 1, 428 S.E.2d 834, cert. denied, 335 N.C. 172, 436 S.E.2d 374 (1993).

Unequal Division Upheld. —

Defendant mother's custody of children, children's residency in family home for most of their lives, their attendance at nearby schools, and defendant's need to occupy the marital residence (i.e., her lower income) were all factors supporting trial court's disproportionate award in equitable distribution proceeding. Hendricks v. Hendricks, 96 N.C. App. 462, 386 S.E.2d 84 (1989), cert. denied, 326 N.C. 264, 389 S.E.2d 113 (1990).

Where the trial court found the presence of a number of distributional factors, including appellee's payment of property taxes, interest, insurance, and repairs on marital property over a period of three years, the trial court did not err in ordering an unequal distribution of marital property. Cobb v. Cobb, 107 N.C. App. 382, 420 S.E.2d 212 (1992).

B. Factors to Be Considered.

Single Factor May Support, etc. —

In accord with the main volume. See Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988).

Findings as to the parties' incomes, liabilities or health and other factors must be made and considered, when evidence concerning them is introduced, in determining whether marital property has been equitably divided. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

If, at an equitable distribution hearing, evidence concerning the income and health of the parties tends to show that an equal division of the marital property is inequitable, the trial court must make findings of fact as to these factors. Taylor v. Taylor, 92 N.C. App. 413, 374 S.E.2d 644 (1988).

The future value of timber, which is planted but will not mature until some years in the future, should not be considered for the purposes of equitable distribution. Cobb v. Cobb, 107 N.C. App. 382, 420 S.E.2d 212 (1992).

Increase in Value of Marital Property. — Trial court did not err in considering, as a distributional factor, that the value of the marital property had increased from the date of the separation to the date of the trial and that such increase inured to the benefit of the defendant husband. Atkins v. Atkins, 102 N.C. App. 199, 401 S.E.2d 784 (1991).

Post-separation appreciation, only refers to that which accumulates to the date of the order for equitable distribution, not in the future. If the rule allowed otherwise, parties would attempt to project the future value of any number of items of marital property, and the equitable distribution trial would become overwhelmingly complicated. Cobb v. Cobb, 107 N.C. App. 382, 420 S.E.2d 212 (1992).

Increase in Value of Stock. — Where it was established by the court's findings of fact that defendant's stock had no value when parties separated and that its increase in value was largely due to his efforts, award of the post-separation increase therein to defendant was authorized by § 50-20(c)(11a) and (12). Nye v. Nye, 100 N.C. App. 326, 396 S.E.2d 91 (1990).

Marital Debt. —

In accord with the main volume. See Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

The mere fact that a judgment was entered against both spouses is not alone evidence sufficient to require classification of the debt as marital. Miller v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

Pursuant to equitable distribution statute, the trial court is required to classify, value and distribute, if marital, the debts of the parties to the marriage. The party claiming the debt to be marital has the burden of proving the value of the debt on the date of separation and that it was incurred during the marriage for the joint benefit of the husband and wife. Miller v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

Distribution of Marital Debts. —

Since the assets and obligations of a husband and wife are reciprocally related, there can be no complete and equitable distribution of their property without also considering and distributing their debt. Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

Credit for Decreasing Marital Debt. — The court must credit a former spouse with at least the amount by which he decreased the principal owed on marital debt by using his separate funds. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Marital Residence. —

A trial court is not foreclosed from considering the post-separation use of the marital residence in reaching its decision as to whether an equal distribution is equitable. Becker v. Becker, 88 N.C. App. 606, 364 S.E.2d 175 (1988).

Payment by One of Spouses on Marital Home Mortgage. — Payment by one of the spouses, after the date of separation, on a marital home mortgage is a factor appropriately considered by the trial court pursuant to subdivisions (c)(11a) and (c)(12) in determining what division of marital property is equitable. However, trial court correctly refused to credit husband with any mortgage payments he made after the separation of the parties where they had stipulated that an equal division of property was equitable. Miller v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

The trial court did not err by failing to credit plaintiff with reducing mortgage on marital home and paying for taxes and insurance, where the court found that plaintiff made mortgage payments on the property since the date of separation, paid property taxes on the residence for one year, and paid homeowner's insurance premiums for three years, and also considered these facts as a distributional factor. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Trial court properly considered defendant's post-separation payments toward mortgages as a distributional factor under subdivision (c)(11a) rather than crediting defendant for those payments. Edwards v. Edwards, 110 N.C. App. 1, 428 S.E.2d 834, cert. denied, 335 N.C. 172, 436 S.E.2d 374 (1993).

Waiver of Child Support. — In the absence of a separation agreement, nothing in the statute requires the trial court to take a waiver of child support into account in calculating an equitable distribution. To the contrary, the determination of child support is to be made separately from that of equitable distribution. Wieneck-Adams v. Adams, 104 N.C. App. 621, 410 S.E.2d 525 (1991), aff'd, 331 N.C. 688, 417 S.E.2d 449 (1992).

Custody is not an appropriate consideration within this section. The only factors considered "just and proper" within the meaning of the section are those relating to the source, availability, and use by a wife and husband of economic resources during the course of their marriage. Gum v. Gum, 107 N.C. App. 734, 421 S.E.2d 788 (1992).

The trial court failed to consider

defendant's contributions to the marital estate as a distributional factor under subdivision (c)(12) of this section. Minter v. Minter, 111 N.C. App. 321, 432 S.E.2d 720, cert. denied, 335 N.C. 176, 438 S.E.2d 201 (1993).

Consideration of Post-Separation Income. — Where post-separation income is not a result of either party's action, the income can be considered as "any other distributional factor" under subdivision (c)(12). Chandler v. Chandler, 108 N.C. App. 66, 422 S.E.2d 587 (1992).

Monies Paid by Husband to Wife after Separation Were Advances. — Trial court correctly treated the $45,457 paid to wife as a distributional factor under subdivision (c)(11) or (12) of this section. Interspousal gifts under subdivision (b)(2) of this section do not become the separate property of the recipient spouse unless the donor expresses the intention to make a gift. This rule is applicable to an even greater extent after the parties have separated. As a matter of public policy, if trial courts are not allowed to consider such payments as distributional factors, then the spouse with possession of marital property during the period between separation and the order of equitable distribution may seek to hold this marital property exclusively. Cobb v. Cobb, 107 N.C. App. 382, 420 S.E.2d 212 (1992).

Misconduct during the marriage, etc. —

In accord with the main volume. See Coleman v. Coleman, 89 N.C. App. 107, 365 S.E.2d 178 (1988).

Misconduct During Litigation, etc. —

Failure to comply with discovery orders, or misconducting oneself during the course of litigation may not be considered as a factor in determining the distribution of marital property. Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988).

When the failure to assist in the compilation and valuation of marital property during litigation causes one party to incur additional expenses, the court may consider such a purely financial consideration in making its distributive award. This is equivalent to the proper consideration of marital misconduct which is related to the economic condition of the marriage as a factor in making the distributive award. Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988).

Parties' Premarital Relationship. — Recitation in the findings of the extramarital nature of the parties' premarital relationship suggested that the trial judge may have improperly considered fault in making the distribution; however, where the husband did not assert, nor was there anything to indicate that he was prejudiced by, this consideration, the error, if any, was harmless. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Consideration of Unvalued Inheritance and Fact of Appraisal Held Error. — Where there was no evidence to support the value of the inheritance the husband received from his mother, it was error for the trial court to consider as a distributional factor under subdivision (c)(1) of this section that the husband had received an inheritance of "significant value" from his mother's estate; furthermore, since the party claiming property to be marital has the burden of presenting evidence on the value of such property, it was error to consider as a distributional factor that the party with the burden of proof had the property appraised and the appraiser testified as to the value of the property. Atkins v. Atkins, 102 N.C. App. 199, 401 S.E.2d 784 (1991).

In case involving equitable distribution, trial court is required to consider liabilities of each party, whether the debts are joint or individual. Mishler v. Mishler, 90 N.C. App. 72, 367 S.E.2d 385, cert. denied, 323 N.C. 174, 373 S.E.2d 111 (1988).

Attribution of husband's payment of $3,000 debt accumulated by wife and minor children for necessities after date of separation to husband's continuing obligation to support his minor children did not constitute an improper use of child support to inflate the income of either party in violation of subsection (f) of this section, but, rather, was a determination that the debt was incurred to purchase necessities after the parties' separation. Beightol v. Beightol, 90 N.C. App. 58, 367 S.E.2d 347, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Failure of Court to Find Distributional Factors. — In determining an appropriate distribution of the marital property, the trial court erred by failing to consider the following factors: (1) evidence that the husband paid homeowner's insurance premiums on the marital home between the date of separation and the date of the trial should have been considered as a distributional factor under subdivision (c)(11a); (2) evidence that the husband was primarily responsible for maintaining and preserving the marital property between the date of separation and the date of trial also should have been considered as a distributional factor under subdivision (c)(11a); and (3) evidence that the wife earned a larger income than the husband should have been considered by the trial court as a distributional factor under subdivision (c)(1). Atkins v. Atkins, 102 N.C. App. 199, 401 S.E.2d 784 (1991).

IV. VALUATION OF PROPERTY.

Date of Separation to Be Used in Valuing Property. — The trial court did not err in failing to consider the current fair market value of all marital assets. Subsection (b) of this section provides that for purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

For the test for determining the date of separation under the equitable distribution statutes, see Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

Appreciation Is Factor to Be Considered. — Post-separation appreciation of marital property itself is neither marital nor separate property. Such appreciation must instead be treated as a distributional factor under subdivision (c)(11a) or (12). Truesdale v. Truesdale, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

Where there is evidence of active or passive appreciation of marital assets after the date of separation, the court must consider the appreciation of the assets as a factor under subdivisions (c)(11a) or (12) of this section. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

When Separation Held to Occur. — Where at all times prior to December 26, 1983, the relationship between plaintiff and defendant was of such a character as to give the appearance that they were husband and wife living together and that they held themselves out to be such, their separation, as that term is defined by case law, did not occur until December 26, 1983. Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

Trial Court Is Required to Value Property Stipulated to Be Marital. — When parties to an equitable distribution action make a valid stipulation that certain property is to be classified as marital property, the trial court is nonetheless required to value and distribute that property. Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

Property Must Be Valued Before It Is Distributed. — Subsection (c) of this section requires the trial court to determine what is marital property, then to find the net value of the property, and finally to make an equitable distribution of that property; thus, where the court made some findings and conclusions regarding marital property, but did not place a value on the marital home, its order that the marital home be sold for not less than $140,000 was at least premature, as the court had not placed a value upon the marital property. Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

This section does not require the trial court to place a monetary value on any distributional factor; this would be an unnecessary burden upon the trial court. Gum v. Gum, 107 N.C. App. 734, 421 S.E.2d 788 (1992).

Valuation of Property After Separation Held Proper. — There was no error when the trial court based its distribution of the marital property on evidence of values of the marital property assigned after the date of the parties' separation, where although plaintiff and defendant were separated on December 24, 1984, the court valued the parties' pensions as of December 31, 1984, defendant failed to demonstrate that either of the parties made any additional contributions, or that any additional interest had accrued to the retirement plans during the seven day interval between the parties' date of separation and the date of valuation. Shoffner v. Shoffner, 91 N.C. App. 399, 371 S.E.2d 749 (1988).

Items Charged on Credit Card. — Court erred in its equitable distribution judgment by including the gross fair-market value of those marital properties which had an outstanding credit card balance and then failing to credit plaintiff for the debt; however, since plaintiff was awarded all of the items charged on the credit card in the property division award, the error was not prejudicial. Hendricks v. Hendricks, 96 N.C. App. 462, 386 S.E.2d 84 (1989), cert. denied, 326 N.C. 264, 389 S.E.2d 113 (1990).

Value of Truck and Lease of Truck. — Trial court did not commit error in assigning a value to, and including as marital property of the parties, both the net fair market value of the truck, and the net present fair market value of a lease of truck; the truck and the lease were two separate items of property and, therefore, the trial judge properly valued the truck and the lease as separate assets. Black v. Black, 94 N.C. App. 220, 379 S.E.2d 879 (1989).

Value of Growing Timber. — Trial judge correctly included the actual value of the land and timber at the date of separation. Because neither party presented evidence of appreciation, if any, between the time of separation and the order for equitable distribution, the trial judge was not required to find the presence of this distributional factor. Cobb v. Cobb, 107 N.C. App. 382, 420 S.E.2d 212 (1992).

For a thorough consideration of valuation and distribution of a considerable marital estate, see Smith v. Smith, 111 N.C. App. 460, 433 S.E.2d 196, petition denied as to additional issues, 335 N.C. 177, 438 S.E.2d 202 (1993).

Valuation Held Erroneous. — Evidence held insufficient to support trial court's valuation of marital home for purposes of equitable distribution of the marital property. Coleman v. Coleman, 89 N.C. App. 107, 365 S.E.2d 178 (1988).

Valuation of Partnership Interest. — When considering the value of a spouse's interest in a business partnership, the task of the appellate court on review is to determine whether the approach used by the trial court reasonably approximates the net value of the partnership interest. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

The withdrawal formula for valuing a partnership interest is presumptively correct, though it may be attacked if not reasonably representative of the value of the defendant's interest. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

In valuing husband's interest in a business partnership, the trial court did not err by using a withdrawal formula, as opposed to a book value approach. Nor did it err by using the withdrawal formula found in the partnership agreement. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Where there was no evidence that defendant had actually withdrawn his partnership interest, or that the distribution ordered by the court would require him to do so, but the court deducted from the value of defendant's partnership interest the amount of income tax defendant would have owed had he withdrawn his partnership interest, it was improper for the court to consider such hypothetical and speculative tax consequences in valuing defendant's partnership interest. Harvey v. Harvey, 112 N.C. App. 788, 437 S.E.2d 397 (1993).

V. AGREEMENTS.

Subsection (d) did not reverse a prior public policy against agreements releasing spousal property rights; by incorporating § 52-10, it instead mandated, among other things, that the policy favoring property settlements continue so that a prior settlement of spousal property rights would also constitute a plea in bar to the equitable distribution of "marital" property under § 50-20. Small v. Small, 93 N.C. App. 614, 379 S.E.2d 273, cert. denied, 325 N.C. 273, 384 S.E.2d 519 (1989).

Separation Agreement Fully Disposing of Property Rights. — If a court finds that a separation agreement fully disposes of the parties' rights arising out of the marriage, the court may not set aside the separation agreement and property settlement, absent fraud or misrepresentation. A separation agreement and property settlement entered into by the parties which fully disposes of the property rights arising out of a marriage acts as a bar to equitable distribution. Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991).

Release of Rights Did Not Violate Public Policy. — Wife's release of property rights under 1980 Post-Nuptial Contract did not violate public policy simply because it was executed prior to the adoption of subsection (d) of this section. Small v. Small, 93 N.C. App. 614, 379 S.E.2d 273, cert. denied, 325 N.C. 273, 384 S.E.2d 519 (1989).

Transactions Between Spouses Must Be Fair and Reasonable. — The relationship between a husband and a wife is the most confidential of all relationships, and transactions between them, to be valid, must be fair and reasonable. A separation agreement must have been entered into without coercion. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

When examining whether both parties freely entered into separation agreement, trial courts should use considerable care because contracts between husbands and wives are special agreements. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

Fraud Need Not Be Shown, Where Settlement Is Unfair Due to Other's Overreaching. — Courts have thrown cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably. To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if settlement is manifestly unfair to spouse because of other's overreaching. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

Unless both parties legally consent to rescinding the agreement, the court is without the power to discard valid contracts between the parties and to order equitable distribution. Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991).

Existence of Confidential Relationship After One Spouse Has Left Home. — A confidential relationship, and a fiduciary duty, between husband and wife can exist even after one spouse has left the home. Where such a relationship exists, there is a duty to disclose all material facts relevant to a separation agreement, and failure to do so constitutes fraud. Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990), discretionary review denied, 328 N.C. 330, 402 S.E.2d 833 (1991).

Same — After Involvement of Attorney. — The involvement of an attorney does not automatically end the confidential relationship of husband and wife. Where one spouse alleges and offers evidence that the confidential relationship still existed and that the attorneys' role was merely to record the agreement the spouses negotiated, it is a question of fact as to whether the confidential relationship has been terminated. Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990), discretionary review denied, 328 N.C. 330, 402 S.E.2d 833 (1991).

Distribution Agreement Should Be Written, Executed, and Acknowledged. —

Without the signature of both the husband and the wife, an agreement may not conform to the requirements of subsection (d) of this section. Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987).

Judgment which effectuated a distribution of the parties' marital property pursuant to an agreement that was not signed by both husband and wife was a court-ordered equitable distribution granted before absolute divorce, and as such was expressly prohibited by § 50-21(a). Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987).

Otherwise, Record Must Show Understanding, etc. —

Although plaintiff claimed the parties stipulated for trial that certain land would be classified as marital property, the record showed no evidence of stipulation; therefore, as the property was a gift to defendant from his mother, trial court's classification of the land as marital property was error. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

Where there was no evidence of a written agreement nor any affirmative assurance that the parties were in agreement concerning the division of personal property, the trial court's reliance on the parties' oral agreement or existing division of personal property was error and all marital personal property should have been included in the equitable distribution. Holder v. Holder, 87 N.C. App. 578, 361 S.E.2d 891 (1987).

Handwritten agreement which was not acknowledged before a certifying officer as defined in § 52-10(b) was not binding upon the court and the court was free to distribute the property. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

Handwritten Agreement Superseded by Later Agreement Incorporated in Judgment. — Trial court did not err in refusing to enforce a 1986 handwritten agreement between the parties which concerned the distribution of marital assets and which provided that defendant would pay plaintiff $15,000 upon her remarriage or upon her sale of a specific parcel of marital property. The language in the judgment clearly indicated that property settlement agreement of 1988, which was incorporated into the judgment, was a full and final settlement of the distribution of marital property which superseded any and all prior agreements between the parties. Rosania v. Rosania, 108 N.C. App. 58, 422 S.E.2d 348 (1992).

Separation Agreement as Bar to Equitable Distribution. — Valid marital agreements releasing all spousal property rights will bar claims for equitable distribution — even if those settlements were executed prior to the adoption of equitable distribution under this section. Morrison v. Morrison, 102 N.C. App. 514, 402 S.E.2d 855 (1991).

Condition in Separation Agreement Not Met. — Condition in separation agreement that if the parties lived continuously separate and apart for a full year, then in that event, wife would transfer her interest in residence and lot to husband as part of property settlement was not met where the evidence showed that on a number of occasions during the year the parties had had sexual relations. Higgins v. Higgins, 321 N.C. 482, 364 S.E.2d 426, rehearing denied, 322 N.C. 116, 367 S.E.2d 911 (1988), decided prior to § 52-10.2.

Misapplication of Stipulations in Agreement. — A trial court abused its discretion in misapplying a $5000 credit, where the parties agreed (1) that certain property would be divided unequally, and (2) that the husband would receive less personal property but would receive the $5000 credit. The trial court applied the credit but in effect ignored the remainder of the stipulation by including property against which the credit was to be an offset when it divided the marital estate equally. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Property Settlement Not Negotiated as Reciprocal Consideration. — If a property settlement is negotiated as "reciprocal consideration" for a separation agreement, the agreements are deemed integrated and the resumption of marital relations will terminate the executory provisions of the property settlement agreement. If not in reciprocal consideration, the provisions of the property settlement are deemed separate and the resumption of marital relations will not affect either the executed or executory provisions of the property settlement agreement. Morrison v. Morrison, 102 N.C. App. 514, 402 S.E.2d 855 (1991).

The absence of a divorce decree did not cancel buy-sell agreement which provided that wife could purchase husband's equity in property "within one year of the date of the entry of an order of divorce"; that if she did not exercise her right of purchase within that time, he could purchase her equity for the same amount within 90 days after "the termination of the one-year period as is hereinabove set forth"; and that if neither bought the equity of the other, the property would be listed for sale with a licensed real estate broker and upon it being sold, the net proceeds would be equally divided. Riley v. Riley, 86 N.C. App. 636, 359 S.E.2d 252, cert. denied, 321 N.C. 121, 361 S.E.2d 596 (1987).

Tenancy by Entirety Not Destroyed by Separation Agreement. — Despite contention of creditor of husband that separation agreement executed by husband and wife destroyed tenancy by the entirety and vested a property interest in husband against which creditor was entitled to levy, where husband and wife were not divorced until over 8 months following the conveyance of the marital property to husband's parents, the property remained entirety property at the time of the conveyance and could not be the subject of a conveyance in defraud of husband's individual creditors. The trial court erred in ordering that creditor was entitled to receive the proceeds of the sale of this property. Dealer Supply Co. v. Greene, 108 N.C. App. 31, 422 S.E.2d 350 (1992), cert. denied, 333 N.C. 343, 426 S.E.2d 704 (1993).

A premarital agreement concerning alimony is void as against public policy. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Invalidity of alimony provision in a premarital agreement did not affect the property provisions of the agreement. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Lack of Acknowledgment in Premarital Agreement. — The validity of a premarital agreement is not affected by the lack of acknowledgment. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Stipulation That Equal Division of Marital Property Is Equitable. — Where the parties stipulate that an equal division of the marital property is equitable, it is not only unnecessary but improper for the trial court to consider, in making that distribution, any of the distributional factors set forth in subsection (c) of this section. Miller v. Miller, 97 N.C. App. 77, 387 S.E.2d 181 (1990).

Error in Conclusion That Agreement Was Sufficiently Identical to Act. — Trial court erred in concluding that premarital agreement was sufficiently identical to the Equitable Distribution Act to allow the trial court to distribute the property according to the Act despite the premarital agreement, where the Act did not exist at the time of the agreement's execution, and the parties could not have intended that the Act govern their property division. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Attacking Consent Judgment. — A consent judgment incorporates the bargained agreement of the parties. Such a judgment can only be attacked on limited grounds. The party attacking the judgment must properly allege and prove that consent was not in fact given, or that it was obtained by mutual mistake or fraud. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

Contract Principles Apply to Consent Judgments. — A contract may be avoided based on mutual mistake where the mistake is common to both parties and because of it each has done what neither intended. A unilateral mistake, unaccompanied by fraud, imposition, or like circumstances, is not sufficient to avoid a contract. These contract principles apply to consent judgments. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

Consent Judgment Held Enforceable. — Where the agreement, in the form of a consent judgment, was altered many times by both parties, both of whom had attorneys, it should have been enforced as written. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

Right to Present Evidence on Issue of Separability. — On wife's motion for increase in alimony payments, where consent order entered into between husband and wife contained support provisions and property settlement provisions, an evidentiary hearing was required to determine the intent of the parties regarding whether the provisions of the agreement were separable or integrated, and it was error for the trial court to refuse to allow husband to present evidence on this issue. Lemons v. Lemons, 103 N.C. App. 492, 406 S.E.2d 8 (1991), decided under law in effect in 1978 at time of consent decree.

Summary Judgment Held Improper. — Summary judgment was improper where there was a genuine issue of material fact as to whether defendant disclosed all material facts pertaining to separation agreement. Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990), discretionary review denied, 328 N.C. 330, 402 S.E.2d 833 (1991).

Plaintiff's affidavit stated she was forced to sign separation agreement under duress and coercion, and defendant denied allegation; therefore, taking plaintiff's affidavit as true, there was a genuine issue of material fact on question of duress and coercion concerning the separation agreement, and grant of summary judgment was error. Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991).

VI. ALIMONY AND CHILD SUPPORT.

Purpose of alimony pendente lite is to give dependent spouse immediate support and allow her to maintain her action. Giving supporting spouse credit for equitable distribution purposes for various payments made as part of alimony pendente lite would defeat the purpose of alimony pendente lite by penalizing the dependent spouse in the final distribution of the marital assets. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408, overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Equitable Distribution to Be Decided Before Permanent Alimony. — Where alimony, child support, and equitable distribution of marital property are requested, the equitable distribution of the property must be decided first. Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

Where equitable distribution order took into consideration fatally defective order for temporary alimony, the court vacated the order for equitable distribution and remanded the cause to the district court. Haywood v. Haywood, 95 N.C. App. 426, 382 S.E.2d 798, cert. denied, 325 N.C. 706, 388 S.E.2d 454 (1989).

Reconsideration of Alimony or Child Support After Equitable Distribution. — Section 50-20 (f) obviously contemplates that a child support order may precede an equitable distribution order. No child support order is ever final and delaying the child support order in lengthy case until after the equitable distribution issue was decided would have prolonged an already long-pending case. The trial court's decision to enter child support order prior to a determination of the equitable distribution issue was proper under the statute. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990).

VIII. FINDINGS OF COURT.

Written Findings of Facts Required in Any Order for Equitable Distribution. — The plain language of subsection (j) mandates that written findings of facts be made in any order for the equitable distribution of marital property made pursuant to this section. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Written findings of fact are required in every case in which a distribution of marital property is ordered under the Equitable Distribution Act, even when marital property is equally divided. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Written findings of fact are required in every case in which a distribution of marital property is ordered under the Equitable Distribution Act, not merely when property is divided unequally. Chandler v. Chandler, 108 N.C. App. 66, 422 S.E.2d 587 (1992).

When Factors in Subsection (c) Must Be Addressed. — If evidence of one or more of the factors listed in subsection (c) is presented, the findings must reflect that the trial judge considered those factors, whether the judge ultimately orders an equal or an unequal distribution. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Judge Must Make Findings as to Each Statutory Factor. — When a party presents evidence which would allow the trial court to determine that an equal distribution of the marital assets would be inequitable, the trial court must then consider all of the distributional factors listed in subsection (c), and must make sufficient findings as to each statutory factor on which evidence was offered; therefore, where the trial court's order explicitly stated that it considered only one factor in determining how the marital assets should be divided, was error. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988), cert. granted, 324 N.C. 336, 378 S.E.2d 794 (1989).

Findings Must Support Award. — In all equitable distribution cases, findings of fact must support the determination that the marital property has been equitably divided. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Findings as to Increase in Value of Separate Property During Marriage. — A trial court's order which did not disclose the steps by which the trial court arrived at its conclusion that the entire increase in value of separate property was marital property, left the Court of Appeals unable to determine whether the trial court correctly applied the "source of funds" theory to the facts; therefore, the order was reversed and remanded for appropriate findings of fact from the evidence previously submitted. Ciobanu v. Ciobanu, 104 N.C. App. 461, 409 S.E.2d 749 (1991).

Findings as to Closely Held Corporation. — A mere recitation of the factors the trial court considered in its valuation of the corporation is not sufficient; the trial court must also indicate the value it attaches to each of the enumerated factors. Locklear v. Locklear, 92 N.C. App. 299, 374 S.E.2d 406 (1988).

Findings as to Stock. — Because competent evidence was presented in equitable distribution action to support the finding that shares of stock acquired by appellee during marriage and prior to separation were a gift from his father and thus separate property, the finding was not disturbed on appeal. Godley v. Godley, 110 N.C. App. 99, 429 S.E.2d 382 (1993).

Where the parties stipulated to an equal division of the marital property, which was equivalent to a stipulation that an equal division of the marital property was equitable, the trial court properly refused to make separate findings of fact regarding the post-separation appreciation of the marital home, its post-separation occupancy by the plaintiff, and the tax savings allegedly realized by the plaintiff because of the post-separation occupancy of the house. Christensen v. Christensen, 101 N.C. App. 47, 398 S.E.2d 634 (1990).

Failure to Enter Finding That De-

fendant Did Not Rebut Presumption Was Harmless Error. — Where there was no evidence in the record to support a finding that certain real property was to remain the separate property of the husband, the failure of the trial court to enter a finding that defendant did not rebut the marital presumption by clear, cogent and convincing evidence was harmless. Furthermore, there was no "intention" in the deed to the parties as tenants by the entirety that the property was to remain defendant's separate property. Therefore, the trial judge correctly included the property among the marital assets. Taylor v. Taylor, 92 N.C. App. 413, 374 S.E.2d 644 (1988).

IX. RIGHTS CREATED BY SUBSECTION (k).

The right to equitable distribution is an inchoate right exercisable only in a divorce action; thus, absent a consent judgment, the right to equitable property distribution could not be effectuated during the one-year separation period that necessarily precedes a filing for absolute divorce; however, this does not mean that a claim for equitable distribution cannot be made during that period. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

The vested right of equitable distribution does not create a property right in marital property, nor does the fact of separation create a lien on specific marital property in favor of the spouse. Rather, it only creates a right to an equitable distribution of that property, whatever a court should determine that property is. Perlow v. Perlow, 128 Bankr. 412 (E.D.N.C. 1991).

Subjection of Each Spouse's Interest to Claims of Creditors. — Upon divorce, each former spouse's undivided one-half interest becomes subject to the claims of his or her individual creditors. Union Grove Mill and Mfg. Co. v. Faw, 103 N.C. App. 166, 404 S.E.2d 508 (1991).

Attachment of Lien Against Spouse upon Conversion to Tenancy in Common. — When property is held by married persons as tenants by the entireties, a lien of judgment effective against only one spouse does not attach to the property until the property is converted into another form of estate. One such type of conversion occurs upon divorce, where property held as a tenancy by the entirety is converted into property held as a tenancy in common, and each former spouse thereafter holds an undivided one-half interest in the subject property. Union Grove Mill and Mfg. Co. v. Faw, 103 N.C. App. 166, 404 S.E.2d 508 (1991).

Insurance Policies. — At the time of separation there were no vested rights under insurance policy on the life of party's son. The rights only vested at his death, and until then plaintiff, as owner of the policy, could have cancelled the policy or changed the beneficiary. At the time of separation, the cash value of the insurance policies was marital property, since the premiums to that point had been paid for with marital assets. The premiums after separation were paid for with plaintiff's assets and therefore the proceeds from the insurance policy were separate property of plaintiff. Foster v. Foster, 90 N.C. App. 265, 368 S.E.2d 26 (1988), cert. denied, 324 N.C. 245, 376 S.E.2d 739 (1989).

X. DISCRETION OF TRIAL COURT AND APPELLATE REVIEW.

But Court's Discretion Is Not Unlimited. —

The trial judge's discretion is to be upheld unless it fails to comply with the requirements of the statute. Wieneck-Adams v. Adams, 104 N.C. App. 621, 410 S.E.2d 525 (1991), aff'd, 331 N.C. 688, 417 S.E.2d 449 (1992).

Standard of Review. — Where defendant's argument on appeal was that he had brought forth enough evidence at the equitable distribution hearing to have allowed the trial judge to identify certain personal and real property as being marital property in part and defendant's separate property in part, the standard of review on appeal would be limited to the question of whether any competent evidence in the record sustains the court's findings. Taylor v. Taylor, 92 N.C. App. 413, 374 S.E.2d 644 (1988).

Judgment Not Disturbed, etc. —

Findings of fact by the trial court are upheld on appeal as long as they are supported by competent evidence. Gum v. Gum, 107 N.C. App. 734, 421 S.E.2d 788 (1992).

Trial court did not abuse its discretion by awarding plaintiff 50 percent of the marital portion of defendant's pension. Judkins v. Judkins, 113 N.C. App. 734, 441 S.E.2d 139 (1994).

Unequal Distribution. — Although there is a presumption that an equal division of marital property is equitable, so long as the trial court considers all the distributional factors in subsection (c) and makes sufficient findings as to each statutory factor on which evidence is offered, the finding of a single distributional factor by the trial court may support an unequal division. Judkins v. Judkins, 113 N.C. App. 734, 441 S.E.2d 139 (1994).

Equitable distribution order should not be disturbed unless the appellate court, upon consideration of the cold record, can determine that the division ordered has resulted in an obvious miscarriage of justice. Morris v. Morris, 90 N.C. App. 94, 367 S.E.2d 408, overruled in part on other grounds, Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

In complex litigation involving equitable distribution, appellate court will not remand judgment for obviously insignificant errors. Mishler v. Mishler, 90 N.C. App. 72, 367 S.E.2d 385, cert. denied, 323 N.C. 174, 373 S.E.2d 111 (1988).

Awards Payable in Lump Sum or Over Time. — It is within the trial court's sound discretion to determine whether the distributive award is to be made payable as a lump sum or over a fixed period of time. Atkins v. Atkins, 102 N.C. App. 199, 401 S.E.2d 784 (1991).

Inadequate Findings by Trial Court Precluded Appellate Review. — Where, among other things, the classification of certain property as marital was erroneous, tainting the findings and conclusions regarding valuation and distribution, and the method of valuing the marital portion of the home was inadequate to support the award to the wife, the findings and conclusions of the trial court were insufficient to allow appellate review. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Trial court did not have authority to reaffirm divorce decree and reserve for future resolution the issue of equitable distribution; since the trial court did not set aside the divorce, but rather, attempted to nullify the consequences of defendant's failure to assert her claim for equitable distribution prior to the entry of judgment of divorce, the order failed. Even if the court had effectively set aside, briefly, the divorce decree itself and then immediately reinstated the divorce decree with a reservation of an equitable distribution claim, the reservation of the equitable distribution claim would have been a legal nullity because plaintiff voluntarily dismissed his equitable distribution claim and defendant did not, during the time the divorce was arguably set aside, file an answer, counterclaim, or separate action requesting equitable distribution. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Authority of Court. — Where neither party made application or stated a claim for equitable distribution prior to the judgment of absolute divorce, the trial court lacked the authority to enter such a judgment. Stirewalt v. Stirewalt, 114 N.C. App. 107, 440 S.E.2d 854 (1994).

§ 50-21. Procedures in actions for equitable distribution of property.

(a) At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f). Within 90 days after service of a claim for equitable distribution, the party who first asserts the claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit listing all property claimed by the party to be marital property and all property claimed by the party to be separate property, and the estimated date-of-separation fair market value of each item of marital and separate property. Within 30 days after service of the inventory affidavit, the party upon whom service is made shall prepare and serve an inventory affidavit upon the other party. The inventory affidavits prepared and served pursuant to this subsection shall be subject to amendment and shall not be binding at trial as to completeness or value. The court may extend the time limits in this subsection for good cause shown. During the pendency of the action for equitable distribution, discovery may proceed, and the court may enter temporary orders as appropriate and necessary for the purpose of preventing the disappearance, waste, or destruction of marital or separate property or to secure the possession thereof.

A judgment for an equitable distribution shall not be entered prior to entry of a decree of absolute divorce, except for a consent judgment, which may be entered at any time during the pendency of the action, or except if the parties have been separated for at least six months and they consent, in a pleading or other writing filed with the court, to an equitable distribution trial prior to the entry of the decree for absolute divorce.

Real or personal property located outside of North Carolina is subject to equitable distribution in accordance with the provisions of G.S. 50-20, and the court may include in its order appropriate provisions to ensure compliance with the order of equitable distribution.

(b) For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties.

(c) Nothing in G.S. 50-20 or this section shall restrict or extend the right to trial by jury as provided by the Constitution of North Carolina. (1981, c. 815, s. 6; 1983, c. 671, s. 1; 1985, c. 689, s. 21; 1987, c. 844, s. 1; 1991, c. 610, s. 2; 1991 (Reg. Sess., 1992), c. 910, s. 1; 1993, c. 209, s. 1.)

Effect of Amendments. —

The 1991 amendment, effective October 1, 1991, inserted "except as provided in G.S. 50-22 and" in the second paragraph of subsection (a).

The 1991 (Reg. Sess., 1992) amendment, effective October 1, 1992, and applicable only to actions for equitable distribution filed or pending on or after that date, added the language beginning "or except if the parties have been separated" in the second paragraph of subsection (a).

The 1993 amendment, effective October 1, 1993, and applicable to actions filed on or after that date, in subsection (a), inserted language beginning "Within 90 days after service" and ending "this subsection for good cause shown," and substituted "the" for "any such" following "During the pendency".

Legal Periodicals. —

Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina, 69 N.C.L. Rev. 319 (1991).

CASE NOTES

No Right to Jury Trial in Equitable Distribution Action. — No right to bring an action for equitable distribution of marital property existed prior to the adoption of the equitable distribution statutes, § 50-20 and this section, and the language of the statutes themselves create no new right to trial by jury; therefore, there is no right to trial by jury for such an action under the Constitution of North Carolina. Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989).

Judgment effectuating a property distribution pursuant to an agreement that was not signed by both spouses was a court-ordered equitable distribution granted before absolute divorce, and as such was expressly prohibited by subsection (a) of this section. Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987).

Jurisdiction over Out-of-State Property. — Subsection (a) of this section simply authorizes jurisdiction over the property of the defendant located outside North Carolina once due process concerns are satisfied. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

When Equitable Distribution Be-

comes Operative. — By the terms of subsection (a), equitable distribution becomes operative only after a husband and wife have separated and a claim for equitable distribution has been filed. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Husband's argument that one must be a party to an existing divorce action before an equitable distribution claim may be asserted had no merit under subsection (a) of this section as it existed in 1981, and would have been summarily dismissed under the 1987 amended version. McIver v. McIver, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Marital property valued as of the date of the parties' separation. This valuation date is used to determine the equitable distributive share of each party. However, where there is evidence of active or passive appreciation of the marital assets after that date, the court must consider such appreciation as a factor under § 50-20(c)(11a) or (12), respectively. Mishler v. Mishler, 90 N.C. App. 72, 367 S.E.2d 385, cert. denied, 323 N.C. 174, 373 S.E.2d 111 (1988).

Date of Valuation. —

Trial court is required to consider only evidence of the value of the marital property as of the date of separation, thus rendering evidence of post-separation occurrences incompetent for the purpose of valuing marital property. Consequently, a trial court is under a duty to exclude such incompetent evidence from its consideration, and its failure to do so is reviewable by the appellate court even in the absence of an objection to the evidence at trial. Christensen v. Christensen, 101 N.C. App. 47, 398 S.E.2d 634 (1990).

Valuation of Pension and Retirement Benefits. —

Where an expert at trial testified that the "before tax" value of the pension plans was $157,242.81 as of the date of separation, the trial court erred in concluding that the net present value of the pensions as of the date of separation was $93,084.60. Wilkins v. Wilkins, 111 N.C. App. 541, 432 S.E.2d 891 (1993).

Application of Equitable Distribution Held Not Retroactive When Pension Benefits Had Accrued Prior to Adoption. — Although the defendant's right to his pension benefits had accrued fully prior to the adoption of the Equitable Distribution Act and the August 1, 1983 amendment to § 50-20 subjecting his pension to equitable distribution, the act and amendment did not affect his property interests until the plaintiff's claim for equitable distribution was filed on May 14, 1984, well after both the act and the amendment became effective. This was not a retroactive application of the act or of the amendment. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

Applied in Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993).

Cited in Collar v. Collar, 86 N.C. App. 109, 356 S.E.2d 405 (1987); Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987); Caldwell v. Caldwell, 93 N.C. App. 740, 379 S.E.2d 271 (1989); Trogdon v. Trogdon, 97 N.C. App. 330, 388 S.E.2d 212 (1990); Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991); State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

§ 50-22. Action on behalf of an incompetent.

A general guardian for an incompetent spouse may commence, defend or maintain any action authorized by this Chapter; however, the court shall not enter a decree of absolute divorce in such an action filed by the guardian on behalf of the incompetent spouse. As an exception to G.S. 50-21, the court may order equitable distribution on behalf of an incompetent spouse without entering a decree of divorce after the parties have lived separate and apart for a period of one year. Provided, however, that the competent spouse may seek and obtain a divorce from the incompetent spouse upon showing basis for the same. (1991, c. 610, s. 1.)

Editor's Note. — Session Laws 1991, c. 610, s. 3 made this section effective October 1, 1991.

§§ 50-23 through 50-29: Reserved for future codification purposes.

ARTICLE 2.

Expedited Process for Child Support Cases.

§ 50-30. Findings; policy; and purpose.

(a) Findings. — The General Assembly makes the following findings:

(1) There is a strong public interest in providing fair, efficient, and swift judicial processes for establishing and enforcing child support obligations. Children are entitled to support from their parents, and court assistance is often required for the establishment and enforcement of parental support obligations. Children who do not receive support from their parents often become financially dependent on the State.

(2) The State shall have laws that meet the federal requirements on expedited processes for obtaining and enforcing child support orders for purposes of federal reimbursement under Title IV-D of the Social Security Act, 42 U.S.C. § 66(a)(2). The Secretary of the Department of Health and Human Services may waive the expedited process requirement with respect to one or more district court district as defined in G.S. 7A-133 on the basis of the effectiveness and timeliness of support order issuance and enforcement within the district.

(3) The State has a strong financial interest in complying with the expedited process requirement, and other requirements, of Title IV-D of the Social Security Act, but the State would incur substantial expense in creating statewide an expedited child support process as defined by federal law.

(4) The State's judicial system is largely capable of processing child support cases in a timely and efficient manner and has a strong commitment to an expeditious system.

(5) The substantial expense the State would incur in creating a new system for obtaining and enforcing child support orders would be reduced and better spent by improving the present system.

(b) Purpose and Policy. — It is the policy of this State to ensure, to the maximum extent possible, that child support obligations are established and enforced fairly, efficiently, and swiftly through the judicial system by means that make the best use of the State's resources. It is the purpose of this Article to facilitate this policy. The Administrative Office of the Courts and judicial officials in each district court district as defined in G.S. 7A-133 shall make a diligent effort to ensure that child support cases, from the time of filing to the time of disposition, are handled fairly, efficiently, and swiftly. The Administrative Office of the Courts and the Department of Human Resources shall work together to improve procedures for the handling of child support cases in which the State or county has an interest, including all cases that qualify in any respect for federal reimbursement under Title IV-D of the Social Security Act. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 86.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "district court district as defined in G.S. 7A-133" for "judicial districts" in the second sentence of subdivision (a)(2), and for "judicial district" in the third sentence of subsection (b).

Legal Periodicals. — For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

§ 50-32. Disposition of cases within 60 days; extension.

CASE NOTES

Hearing Scheduled on Regular Domestic Calendar Instead of Expedited Calendar. — In an action for modification of child custody order seeking child support, where the trial judge scheduled a hearing on the regular domestic calendar instead of the expedited calendar for domestic court cases, the defendant was not prejudiced by the court's placement of this case as the case was continued within the 60 day requirement of this section. Payne v. Payne, 91 N.C. App. 71, 370 S.E.2d 428 (1988).

§ 50-33. Waiver of expedited process requirement.

(a) DHR to Seek Waiver. — The Department of Human Resources, with the assistance of the Administrative Office of the Courts, shall vigorously pursue application to the Secretary of the Department of Health and Human Services for waivers of the federal expedited process requirement.

(b) Districts That Do Not Qualify. — In any district court district as defined in G.S. 7A-133 that does not qualify for a waiver of the federal expedited process requirement, an expedited process shall be established as provided in G.S. 50-34. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 87.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "district court district as defined in G.S. 7A-133" for "judicial district" in subsection (b).

§ 50-34. Establishment of an expedited process.

(a) Districts Required to Have Expedited Process. — In any district court district as defined in G.S. 7A-133 that is required by G.S. 50-33(b) to establish an expedited child support process, the Director of the Administrative Office of the Courts shall notify the chief district court judge and the clerk or clerks of superior court in the district in writing of the requirement. The Director of the Administrative Office of the Courts, the chief district court judge, and the clerk or clerks of superior court in the district shall implement an expedited child support process as provided in this section.

(b) Procedure for Establishing Expedited Process. — When a district court district as defined in G.S. 7A-133 is required to implement an expedited process, the Director of the Administrative Office of the Courts, the chief district judge, and the clerk of superior court in an affected county shall determine by agreement whether the child support hearing officer or officers for that county shall be one or more clerks or one or more magistrates. If such agreement has not been reached within 15 days after the notice required by subsection (a) when implementation is required, the Director of the Administrative Office of the Courts shall make the decision. If it is decided that the hearing officer or officers for a county shall be magistrates, the chief district judge, the clerk of superior court, and the Director of the Administrative Office of the Courts shall ensure his or their qualification for the position. If it is decided that the hearing officer or officers for a county shall be the clerk or assistant clerks, the clerk of superior court in the county shall designate the person or persons to serve as hearing officer, and the chief district judge, the clerk of superior court, and the Director of the Administrative Office of the Courts shall ensure his or their qualification for the position.

(c) Public To Be Informed. — When an expedited process is to be implemented in a county or district court district as defined in G.S. 7A-133, the chief district court judge, the clerk or clerks of superior court in affected counties in the district, and the Administrative Office of the Courts shall take steps to ensure that attorneys, the general public, and parties to pending child support cases in the county or district are informed of the change in procedures and helped to understand and use the new system effectively. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 88.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "district court district as defined in G.S. 7A-133" for "judicial district" near the beginning of subsections (a), (b) and (c).

§ 50-36. Child support procedures in districts with expedited process.

(a) Scheduling of Cases. — The procedures of this section shall apply to all child support cases in any district court district as defined in G.S. 7A-133 or county in which an expedited process has been established. All claims for the establishment or enforcement of a child support obligation, whether the claim is made in a separate action or as part of a divorce or any other action, shall be scheduled for hearing before the child support hearing officer. The initiating party shall send a notice of the date, time, and place of the hearing to all other parties. Service of process shall be made and notices given as provided by G.S. 1A-1, Rules of Civil Procedure.

(b) Place of Hearing. — The hearing before the child support hearing officer need not take place in a courtroom, but shall be conducted in an appropriate judicial setting.

(c) Hearing Procedures. — The hearing of a case before a child support officer is without a jury. The rules of evidence applicable in the trial of civil actions generally are observed; however, the hearing officer may require the parties to produce and may consider financial affidavits, State and federal tax returns, and other financial or employment records. Except as otherwise provided in this Article, the hearing officer shall determine the parties' child support rights and obligations and enter an appropriate order based on the evidence and the child support laws of the State. All parties shall be provided with a copy of the order.

(d) Record of Proceeding. — The record of a proceeding before a child support hearing officer shall consist of the pleadings filed in the child support case, documentation of proper service or notice or waiver, and a copy of the hearing officer's order. No verbatim recording or transcript shall be required or provided at State expense.

(e) Transfer to District Court Judge. — Upon his own motion or upon motion of any party, the hearing officer shall transfer a case for hearing before a district court judge when the case involves:

(1) A contested paternity action;
(2) A custody dispute;
(3) Contested visitation rights;
(4) The ownership, possession, or transfer of an interest in property to satisfy a child support obligation; or
(5) Other complex issues.

Upon ordering such a transfer, except in cases of contested paternity, the hearing officer shall also enter a temporary order that provides for the payment of a money amount or otherwise addresses the child's need for support pending the resolution of the case by the district court judge. The chief district court judge shall establish a procedure for such transferred cases to be given priority for hearing before a district court judge. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 89.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "district court district as defined in G.S. 7A-133" for "judicial district" in the first sentence of subsection (a).

CASE NOTES

Hearing Scheduled on Regular Calendar Instead of Expedited Calendar. — In an action for modification of child custody order seeking child support, where the trial judge scheduled a hearing on the regular domestic calendar instead of the expedited calendar for domestic court cases, the defendant was not prejudiced by the court's placement of this case as the case was continued within the 60 day requirement of this section. Payne v. Payne, 91 N.C. App. 71, 370 S.E.2d 428 (1988).

Chapter 50A.

Uniform Child Custody Jurisdiction Act.

§ 50A-1. Purposes of Chapter; construction of provisions.

CASE NOTES

Cited in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989); Stancil v. Brock, 108 N.C. App. 745, 425 S.E.2d 446 (1993); In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993).

§ 50A-2. Definitions.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (UCCJA), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

§ 50A-3. Jurisdiction.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (UCCJA), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Where an Indiana order, which awarded custody of child living in Indiana to mother, contained no findings of fact that Indiana was child's home state, or had been her home state within six months before the action was commenced, or that it was in her best interests for Indiana to assume jurisdiction because she had significant connection with the state, a North Carolina trial court erred in concluding that North Carolina must give full faith and credit to the Indiana orders; the Indiana court had not assumed jurisdiction over the custody determination of the child in substantial conformity with this Act. Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

Exercise of Jurisdiction Upheld. — Where the minor child resided in North Carolina for about one year after birth, North Carolina was the only state where the parties and the minor child lived as a family unit and, although there are a number of witnesses that reside in New Hampshire, there are numerous other witnesses who reside in North Carolina, district court's order that North Carolina was the most appropriate and convenient forum was appropriate. Westneat v. Westneat, 113 N.C. App. 247, 437 S.E.2d 899 (1994).

Proper Determination of Home State. — Mother and children had significant connection to North Carolina and there was substantial evidence in North Carolina. Therefore, North Carolina court correctly determined that North Carolina, not Georgia, was home state. Court did not err in assuming jurisdiction and modifying Georgia custody decree, even though children resided in Georgia and there was no evidence that Georgia had declined jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Where children had lived in North Carolina continuously from March 1987 until March 1989 when custody action was filed except for the 10-month period during which the children resided with defendant in Georgia pursuant to the Georgia temporary custody decree and the plaintiff resided in North Carolina for the entire period, the trial court correctly determined that North Carolina was the home state, thereby meeting one of the bases of jurisdiction under this section. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Significant Connection. — Where children resided in North Carolina for all but ten months of the two-year period prior to this action and that plaintiff resided in North Carolina for the entire period, the children and plaintiff had a "significant connection" with North Carolina, and there was substantial evidence regarding the children's "present or future care, protection, training, and personal relationships" in North Carolina. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Applied in Shingledecker v. Shingledecker, 103 N.C. App. 783, 407 S.E.2d 589 (1991).

Cited in In re Trueman, 99 N.C. App. 579, 393 S.E.2d 569 (1990); Brooks v. Brooks, 107 N.C. App. 44, 418 S.E.2d 534 (1992); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

§ 50A-4. Notice and opportunity to be heard.

CASE NOTES

Applied in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

Quoted in Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

§ 50A-5. Service of notice.

CASE NOTES

Applied in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

Quoted in Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

§ 50A-6. Simultaneous proceedings in other states.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising

Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

§ 50A-9. Information under oath to be submitted to the court.

CASE NOTES

This section requires that every party in a custody pleading must give information under oath regarding the children's present address, the places where they have lived within the last five years, and the names and present addresses of the persons with whom the children have lived during that period. Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Proper Exercise of Jurisdiction Despite Noncompliance with Oath Requirements. — Court of appeals declined to accept plaintiff's argument that failure to comply fully with this section's oath requirements defeated the court's subject matter jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

§ 50A-13. Recognition of out-of-state custody decrees.

CASE NOTES

Failure to Attempt Service. — Where there was no attempt to serve other parent with notice of a Tennessee temporary custody hearing and she in fact never received notice of the hearing, the Tennessee court did not act substantially in conformity with this Chapter, and the order made by the Tennessee court was jurisdictionally defective. Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

§ 50A-14. Modification of custody decree of another state.

CASE NOTES

Georgia's version of the Uniform Child Custody Jurisdiction Act (UCCJA) conforms to North Carolina's version. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Proper Exercise of Jurisdiction and Modification of Custody Decree. — Mother and children had significant connection to North Carolina and there was substantial evidence in North Carolina. Therefore, North Carolina court correctly determined that North Carolina, not Georgia, was home state. Court did not err in assuming jurisdiction and modifying Georgia custody decree, even though children resided in Georgia and there was no evidence that Georgia had declined jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

§ 50A-15. Filing and enforcement of custody decree of another state.

Legal Periodicals. — For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

§ 50A-20. Assistance to courts of other states.

CASE NOTES

Court erred in authorizing law enforcement officers to pick up children who were residing with petitioner and deliver them to respondent in an effort to assist Georgia court in enforcing its custody order; while trial court could have resorted to traditional contempt proceedings, there was no statutory basis for invoking the participation of law enforcement officers in producing the children. Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Chapter 50B.

Editor's Note. — The legislation and annotations affecting Chapter 50B have been included in a recently published replacement chapter.

Chapter 51.

Marriage.

Article 1.

General Provisions.

Sec.
51-2. Capacity to marry.

Article 2.

Marriage Licenses.

51-7. (Effective October 1, 1994 — See editor's note) Penalty for solemnizing without license.
51-9 through 51-11. [Repealed.]
Sec.
51-12. [Repealed.]
51-13. [Repealed.]
51-15. (Effective October 1, 1994 — See editor's note) Obtaining license by false representation misdemeanor.
51-18.1. Correction of errors in names in application or license; amendment of names in application or license.

ARTICLE 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.

CASE NOTES

Applied in State v. Woodruff, 99 N.C. App. 107, 392 S.E.2d 434 (1990).

§ 51-1.1. Certain marriages performed by ministers of Universal Life Church validated.

CASE NOTES

Where marriage was never invalidated, this section applied to validate it. The net effect of this section was to render the marriage valid from its inception, as it was voidable, rather than void. Fulton v. Vickery, 73 N.C. App. 382, 326 S.E.2d 354, cert. denied, 313 N.C. 599, 332 S.E.2d 178 (1985).

§ 51-2. Capacity to marry.

(a) All unmarried persons of 18 years, or older, may lawfully marry, except as hereinafter forbidden. In addition, persons over 16 years of age and under 18 years of age may marry, and the register of deeds may issue a license for such marriage, only after there shall have been filed with the register of deeds a written consent to such marriage, said consent having been signed by the appropriate person as follows:

(1) By the father if the male or female child applying to marry resides with his or her father, but not with his or her mother;

(2) By the mother if the male or female child applying to marry resides with his or her mother, but not with his or her father;

(3) By either the mother or father, without preference, if the male or female child applying to marry resides with his or her mother and father;

(4) By a person, agency, or institution having legal custody, standing in loco parentis, or serving as guardian of such male or female child applying to marry.

Such written consent shall not be required for an emancipated minor if a certificate of emancipation issued pursuant to Article 56 of Chapter 7A or a certified copy of a final decree or certificate of emancipation from this or any other jurisdiction is filed with the register of deeds.

(b) When an unmarried female who is more than 12 years old, but less than 18 years old, is pregnant or has given birth to a child and such unmarried female and the putative father of the child, either born or unborn, shall agree to marry, and consent in writing to such marriage, as set out in subsection (a), subdivisions (1), (2), (3) or (4) above, or by the director of social services of the county of residence of either party, is given on the part of the female, the register of deeds is authorized to issue to said parties a license to marry, and it shall be lawful for them to marry in accordance with the provisions of this Chapter.

(c) When a license to marry is procured by or on behalf of any person under 18 years of age by fraud or misrepresentation, a parent or person standing in loco parentis to such person under 18 years of age shall be a proper party plaintiff in an action to annul said marriage. (R.C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C.S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; 1961, c. 186; 1967, c. 957, s. 1; 1969, c. 982; 1985, c. 608.)

Effect of Amendments. — The 1985 amendment, effective July 4, 1985, added the sentence at the end of subsection (a).

§ 51-3. Want of capacity; void and voidable marriages.

CASE NOTES

Bigamous Marriages Are Void. — A bigamous marriage is a nullity, with no legal rights flowing from it, and can be collaterally attacked at any time. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Wife who knowingly entered a bigamous marriage was subsequently estopped from asserting the invalidity of that marriage in order to avoid the consequences flowing from her wrongful conduct; therefore, the trial court correctly terminated husband's obligation to pay alimony under the separation agreement. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Applied in Heiser v. Heiser, 71 N.C. App. 223, 321 S.E.2d 479 (1984).

ARTICLE 2.

Marriage Licenses.

§ 51-7. (Effective October 1, 1994 — See editor's note) Penalty for solemnizing without license.

Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within 10 days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars ($200.00) to any person who sues therefor, and he shall also be guilty of a Class 1 misdemeanor. (R.C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8; Code, s. 1817; Rev., ss. 2087, 3372; C.S., s. 2499; 1953, c. 638, s. 1; 1967, c. 957, s. 5; 1993, c. 539, s. 415; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor".

§§ 51-9 through 51-11: Repealed by Session Laws 1994, c. 647, ss. 1-3, effective October 1, 1994.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 647, s. 6 provides that ss. 1 to 3, which repealed these sections, apply to marriage license applications filed on or after that date.

§ 51-12: Repealed by Session Laws 1985, c. 589, s. 27, effective January 1, 1986.

§ 51-13: Repealed by Session Laws 1994, c. 647, s. 4, effective October 1, 1994.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 647, s. 6, provides that s. 4, which repealed this section, applies to marriage license applications filed on or after that date.

The repealed section was amended by Session Laws 1993, c. 539, s. 416, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), effective October 1, 1994. The section is set out above as repealed.

§ 51-15. (Effective October 1, 1994 — See editor's note) Obtaining license by false representation misdemeanor.

If any person shall obtain a marriage license by misrepresentation or false pretenses, he shall be guilty of a Class 3 misdemeanor. (1885, c. 346; Rev., s. 3371; C.S., s. 2501; 1967, c. 957, s. 4; 1993, c. 539, s. 417; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50.00), or imprisoned not exceeding 30 days, or both, at the discretion of the court".

§ 51-18.1. Correction of errors in names in application or license; amendment of names in application or license.

(a) When it shall appear to the register of deeds of any county in this State that the names of either or both parties to a marriage is incorrectly stated on an application for a marriage license, or upon a marriage license issued thereunder, or upon a return or certificate of an officiating officer, the register of deeds is authorized to correct such record or records to show the true name and names of the parties to the marriage upon being furnished with an affidavit signed by one or both of the applicants for the marriage license, accompanied by affidavits of at least two other persons who know the true name or names of the person or persons seeking such correction.

(b) When the name of a party to a marriage has been changed by court order as the result of a legitimation action or other cause of action, and the party whose name is changed present a signed affidavit to the register of deeds indicating the name change and requesting that the application for a marriage license, the marriage license, and the marriage certificate of the officiating officer be amended by substituting the changed name for the original name, the register of deeds may amend the records as requested by the party, provided the other party named in the records consents to the amendment. (1953, c. 797; 1959, c. 344; 1987, c. 576.)

Effect of Amendments. — The 1987 amendment, effective July 8, 1987, added "amendment of names in application or license" at the end of the catchline, designated the first paragraph as subsection (a), and added subsection (b).

Chapter 52.

Powers and Liabilities of Married Persons.

Sec.
52-11. Antenuptial contracts and torts.

§ 52-3. Married person may insure spouse's life.

CASE NOTES

Insurable Interest in Spouse's Life. — This section does not create in a wife an insurable interest in the life of her husband. She has such an interest without the benefit of the section. Cook v. Bankers Life & Cas. Co., 329 N.C. 488, 406 S.E.2d 848 (1991).

Right to Insure Spouse's Life Without Consent. — This section gives married persons the right to insure their spouses' lives without their consent. Cook v. Bankers Life & Cas. Co., 329 N.C. 488, 406 S.E.2d 848 (1991), distinguishing Acme Mfg. Co. v. McCormick, 175 N.C. 277, 95 S.E. 555 (1918).

§ 52-8. Validation of contracts failing to comply with provisions of former § 52-6.

CASE NOTES

Postnuptial agreement executed in 1977 could not be set aside due to any alleged noncompliance with former § 52-6 (repealed 1977) or § 52-10 (amended 1977). Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

§ 52-10. Contracts between husband and wife generally; releases.

CASE NOTES

Postnuptial agreement executed in 1977 could not be set aside due to any alleged noncompliance with former § 52-6 (repealed 1977) or § 52-10 (amended 1977). Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred, and where plaintiff never asserted that the actual signature on an agreement was other than his own, but suggested only a technical violation of § 52-10.1, he did not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment. Moore v. Moore, 108 N.C. App. 656, 424 S.E.2d 673, aff'd per curiam, 334 N.C. 684, 435 S.E.2d 71 (1993).

§ 52-10.1. Separation agreements.

Legal Periodicals. — For survey on the award of attorneys' fees for breach of a separation agreement, see 70 N.C.L. Rev. 2016 (1992).

CASE NOTES

Presumption of Validity of Acknowledgment. — To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred, and where plaintiff never asserted that the actual signature on an agreement was other than his own, but suggested only a technical violation of this section, he did not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment. Moore v. Moore, 108 N.C. App. 656, 424 S.E.2d 673, aff'd per curiam, 334 N.C. 684, 435 S.E.2d 71 (1993).

§ 52-10.2. Resumption of marital relations defined.

CASE NOTES

There are two lines of cases regarding resumption of marital relations: those which present the question of whether the parties hold themselves out as man and wife as a matter of law, and those involving conflicting evidence such that mutual intent becomes an essential element; these two lines of cases establish two alternative methods by which a trial court may find that separated spouses have reconciled. Schultz v. Schultz, 107 N.C. App. 366, 420 S.E.2d 186 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

Future, but Not Existing, Alimony Obligations Cease upon Reconciliation. — When the parties resumed marital relations, appellant's obligations to pay alimony in the future ceased. His duty under the consent judgment to pay alimony up to the date of reconciliation, however, as an executed portion of the consent judgment, remained enforceable through the court's contempt power. Schultz v. Schultz, 107 N.C. App. 366, 420 S.E.2d 186 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

§ 52-11. Antenuptial contracts and torts.

The liability of a married person for any debts owing, or contracts made or damages incurred before marriage shall not be impaired or altered by such marriage. No person shall by marriage incur any liability for any debts owing, or contracts made, or for wrongs done by his or her spouse before the marriage. (1871-2, c. 193, ss. 13, 14; Code, ss. 1822, 1823; Rev., ss. 2101, 2106; C.S., s. 2517; 1965, c. 878, s. 1.)

Editor's Note. — This section has been set out above, as it was inadvertently omitted from the main volume.

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

§ 52A-1. Short title.

CASE NOTES

Applied in Pieper v. Pieper, 108 N.C. App. 722, 425 S.E.2d 435 (1993).

§ 52A-29. Registration procedure; notice.

CASE NOTES

Failure to Describe Obligor's Property or to List States. — The failure to describe the obligor's property does not warrant dismissal of an action; it merely limits the enforcement remedies available to the obligee. Likewise, failure to list other states where the decree is registered does not warrant a dismissal. Silvering v. Vito, 107 N.C. App. 270, 419 S.E.2d 360 (1992).

Actual Notice Sufficient. — Although defendant did not receive notice of registration from the clerk, he did have actual notice of registration. A civil summons and the Uniform Reciprocal Enforcement of Support Act (URESA) petition were served upon defendant eight days after the URESA petition was filed. Therefore, the defendant received actual notice of the pending litigation within the 20 days prescribed. Silvering v. Vito, 107 N.C. App. 270, 419 S.E.2d 360 (1992).

§ 52A-30. Effect of registration; enforcement procedure.

CASE NOTES

Failure to Describe Obligor's Property or to List States. — The failure to describe the obligor's property does not warrant dismissal of an action; it merely limits the enforcement remedies available to the obligee. Likewise, failure to list other states where the decree is registered does not warrant a dismissal. Silvering v. Vito, 107 N.C. App. 270, 419 S.E.2d 360 (1992).

Cited in Hill v. Hill, 335 N.C. 140, 435 S.E.2d 766 (1993).

Chapter 52B.

Uniform Premarital Agreement Act.

Editor's Note. — The official commentary to this Act has been printed in the main volume through the permission of the National Conference of Commissioners on Uniform State Laws, and copies of the Uniform Act may be ordered from them at a cost of $10.00, plus $3.00 shipping and handling at 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, (312) 915-0195.

§ 52B-1. Short title.

Legal Periodicals. — For article, "North Carolina's Uniform Premarital Agreement Act, A Contract Perspective," see 12 Campbell L. Rev. 221 (1990).

For comment, "The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage," see 28 Wake Forest L. Rev. 1037 (1993).

§ 52B-2. Definitions.

CASE NOTES

Cited in King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994).

§ 52B-3. Formalities.

CASE NOTES

Acknowledgment Not Required. — The Uniform Premarital Agreement Act does not require acknowledgment of premarital agreements. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990).

§ 52B-7. Enforcement.

CASE NOTES

A premarital agreement concerning alimony is void as against public policy. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Invalidity of alimony provision in a premarital agreement did not affect the property provisions of the agreement. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Party Claiming Invalidity Has Burden of Proof. — In an action to enforce a premarital agreement executed prior to enactment of Chapter 52B, the party claiming the invalidity of the agreement for reasons of undue influence, duress, fraud, unconscionability or inadequate disclosure has the burden of proof. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Presentation of a premarital agreement to wife on the day before the wedding, combined with the threat that the marriage would not take place unless the document was executed, did not amount to duress and undue influence. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Premarital Agreement Was Not Sufficiently Identical to Act. — Trial court erred in concluding that premarital agreement was sufficiently identical to the Equitable Distribution Act to allow the trial court to distribute the property according to the Act despite the premarital agreement, where the Act did not exist at the time of the agreement's execution, and the parties could not have intended that the Act govern their property division. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Cited in King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994).

§ 52B-9. Limitation of actions.

CASE NOTES

Cited in Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1994

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1994 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY
Attorney General of North Carolina

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